Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

JOE'S STONE CRAB, INC.,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the EEOC, in prosecuting on behalf of individuals under §706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f), a claim of disparate-treatment discrimination proscribed by §703 of Title VII, 42 U.S.C. §2000e-2(a), may prove such a claim solely through evidence of a pattern or practice of discrimination against the claimants' class under §707 of Title VII, 42 U.S.C. §2000e-6(a), assuming that pattern-or-practice discrimination is properly pleaded.

2. If so, whether an individual claimant pleading and asserting only disparate-treatment discrimination may nevertheless utilize the pattern-or-practice standard of proof as a substitute for satisfying both her prima facie case and the statutory prerequisite of timeliness in a disparate-treatment case.

3. Whether a disparate-treatment claimant may likewise shift the burden of proof to the employer despite the employer's articulation of a legitimate non-discriminatory reason for not hiring the claimant, thus superimposing a legal framework hitherto applicable only in a pattern-or-practice case, and only after discrimination has been proved.

4. Whether the Court of Appeals violated Joe's right to due process by affirming the district court's disparate-treatment judgment on the unpleaded pattern-or-practice theory.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the Petitioner states that it has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 296 F.3d 1265 ("*Joe's II*"). The opinion of the district court (App. 19) is reported at 136 F. Supp.2d 1311. The prior opinion of the court of appeals (App. 28) is reported at 220 F.3d 1263 ("*Joe's I*"). The prior opinion of the district court (App. 180) is reported at 15 F. Supp.2d 1364.

JURISDICTION

The court of appeals' judgment was entered on August 4, 2000. A timely petition for rehearing and rehearing en banc was denied on December 19, 2002 (App. 23). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a), proscribes disparate-treatment discrimination, providing in relevant part that it "shall be an unlawful employment practice for an employer" "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ."

Section 706 of Title VII, 42 U.S.C. §2000e-5(e)(1), provides in relevant part that "in a case of unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. . . . "

Section 707 of Title VII, 42 U.S.C. §2000e-6(a), in relevant part proscribes "a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter . . . ", and authorizes the Equal Employment Opportunity Commission (hereinafter "EEOC") to bring an action on behalf of an affected class.

STATEMENT OF THE CASE

Introduction. Petitioner Joe's Stone Crab, Inc. (hereinafter "Joe's") seeks review of the Court of Appeals' decision affirming a judgment against Joe's for disparate treatment in not hiring two female applicants for food server positions. The court acknowledged that no proof of the alleged individual disparate treatment of either claimant had been offered. It based its affirmance solely on the EEOC's asserted demonstration that Joe's had engaged in a pattern or practice of intentional discrimination against women applicants for server positions, which assertedly had deterred the two claimants from applying, even though the EEOC had not brought and in fact had

disclaimed any theory of pattern-or-practice discrimination. On the same basis, the court also held that even in this disparate-treatment case, such proof of a pattern or practice satisfied the 300-day rule of §706 of Title VII, 42 U.S.C. §2000e-5(e)(1), notwithstanding that the EEOC had not provided any examples of discrimination by Joe's – against the two claimants or anyone else – within 300 days of its charge. This unprecedented formula for proving individual disparate treatment through the importation of an unpleaded (and waived) assertion of systemic discrimination violated the longstanding statutory requirement of timeliness; violated the established requirements for establishing a prima facie case; violated the established allocation of the burden of proof in defense of such a claim; and violated Joe's right to due process.

The District Court's First Ruling. Joe's Stone Crab is a "landmark" fourth-generation seasonal restaurant in Miami (R6-159-2, 8), owned and run by women (*id.* at 3; R28-2739-40), which for 85 years has championed civil rights in Florida (*see* R6-159-5; R28-2750, 2764-66).[1] Although the EEOC's original charge (App. 234) and finding (App. 220) alleged a pattern or practice of intentional discrimination by Joe's in both recruitment and hiring of food servers, its complaint (R1-1) and amended complaint (App. 214), filed on behalf of 12 individuals, dropped the pattern-or-practice theory, pleading only disparate treatment and disparate impact, under §706 of

[1] The citations are to the volume of the Record on Appeal in the Court of Appeals, the docket number of the pleading in question, and the page number of that pleading.

Title VII, 42 U.S.C. §2000e-2(k)(1)(A)(i), in both recruitment and hiring (*see also* R2-98-7-8, the pre-trial stipulation). In its opening statement the EEOC said: "I do want to make it clear from the beginning, this is not a pattern and practice type of claim. . . . I do want to make it clear, it is not a pattern and practice claim, it is a disparate claim" (R15-11). It said the same thing in closing (R29-3002); and repeatedly throughout the trial, Joe's emphasized that no such claim was before the court (*see* R15-25; R25-1618, 1620, 1622; R29-2964, 2969). The Court of Appeals acknowledged that the EEOC "did not allege that Joe's engaged in a pattern and practice of discrimination . . . " (App. 3).

In its first liability finding, in favor of 4 of the remaining 5 claimants, the district court rejected all claims of disparate treatment, because "the EEOC has not proved intentional discrimination" (App. 180). It found only disparate impact purportedly caused by subjectivity in Joe's hiring process (App. 199-203, 205-06). As the Court of Appeals noted in *Joe's I* (App. 30, 37, 56-60), the basis for this finding was that Joe's "reputation" – about which the district court, over Joe's objection, had allowed only hearsay evidence not admitted to prove its truth (*see* App. 59, 195) – had deterred women from applying for server positions. This is the posture of the case which reached the Court of Appeals in *Joe's I*.[2]

[2] As the court in *Joe's I* recognized, the district court's reliance upon the hearsay evidence of Joe's reputation was indispensable to its ruling, because the percentage of women servers hired by Joe's, both before and after the EEOC's charge, was statistically identical to the percentage of women applicants for those positions (*see* App. 36, 46-48,

(Continued on following page)

The Appeal in Joe's I. Joe's appealed and the EEOC initially cross-appealed, presumably to challenge the district court's rejection of its disparate-treatment claim. But early in the appeal, the EEOC withdrew its cross-appeal (*see* App. 5). Thus the only issue on appeal in *Joe's I* was whether the district court had erred in finding for the EEOC on its disparate-impact claim.[3] The court in *Joe's I* vacated the disparate-impact ruling with instructions to enter judgment for Joe's, finding "not a scintilla of evidence" to support it (App. 62). At that point, the opinion should have ended. It did not. Notwithstanding the

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50) ("[I]t is critical to observe that no statistically-significant disparity exists between the percentage of women who actually *applied* to Joe's and the percentage of women who were *hired* as servers by Joe's"). Joe's *always* had female servers in its employ, but at times very few women servers, because there were so few female applicants (*see* R21-1500; R22-1697, 1699). At least four female servers, including 17-year veteran Dottie Malloy, were hired by Joe's prior maitre'd (*id.*). And Joe's evidence was unrebutted that relatively few women applied for server positions during the period in question, in part because the servers are required to carry 35-50-pound trays (*see* R20-1250-52, 1264; R21-1382, 1507; R23-1876; R27-2682-83; R28-2801-02, 2804) and work at a "frantic" (R22-1679) pace (*see* R20-1253; R21-1369; R23-1876, 1937-38; R24-2075); and in part because of high crime in the area of Joe's location at that time (*see* R18-860; R20-1256; R24-2113-14; R27-2681-82; R28-2755-58, 2799-2800). The district court chose instead to accept the truth of hearsay evidence of Joe's reputation, which had not been admitted to prove its truth (*see* App. 12).

[3] In the absence of a cross-appeal, the Court of Appeals was not empowered to reverse the district court's judgment for Joe's on the disparate-impact claim, in a manner which would expand the scope of its judgment. *See infra* note 21. After dropping its cross-appeal, the EEOC therefore properly addressed the disparate-treatment issue only as a basis for advocating affirmance on a right-for-the-wrong-reason theory. The Court of Appeals in *Joe's I* rejected that argument, because the record is "replete with conflicting testimony" on the disparate-treatment claim (App. 29; *see* App. 69-70).

absence of a cross-appeal, the court in *Joe's I sua sponte* reversed the district court's disparate-treatment ruling for Joe's on the ground that it was inconsistent with some of the district court's preliminary factual findings, which were based on "conflicting testimony," and remanded the claim for clarification (App. 64-65).

In so doing, however, the court in *Joe's I* emphasized the error of the district court's reliance upon hearsay evidence of Joe's reputation. It noted that "the district court expressly admitted evidence of Joe's reputation . . . not for the truth of the matter asserted but only to show the state of mind of the women who failed to apply" (App. 59); that "reputation itself is neither a specific act or a practice" (App. 57); and that *only* in a pattern-or-practice case, only *after* systemic discrimination has been "conceded or proven," and then *only* in fashioning the remedy, is evidence of reputation admissible to excuse an applicant's failure to apply, under the "futile gesture theory" of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) (App. 57-58). Thus the court in *Joe's I*, without a cross-appeal, *sua sponte* invited the district court to change its ruling for Joe's on the disparate-treatment claim, but with the admonition that the hearsay evidence of Joe's reputation was unavailable as a basis for doing so.

The District Court's New Ruling on Remand. On remand the district court asked for no additional briefs or argument (*see* App. 5); incorporated verbatim its prior findings on the disparate-impact claim (including those based on the hearsay evidence of Joe's reputation); found the "conflicting testimony" offered as direct evidence of disparate treatment "not credible"; added new findings that the people at Joe's who did the hiring were guilty of

systemic discrimination against women, with management's silent acquiescence; converted the hearsay evidence into proof of a "deserved, well-known reputation for discrimination" which "caused females not to apply"; and without mentioning any individual claims, held that these systemic findings proved that Joe's had engaged in "intentional disparate treatment sex discrimination" against 4 specific individuals (App. 22).

The Appeal in Joe's II. Joe's appealed, contending in part that the district court's systemic findings were precluded by the EEOC's failure to plead and repeated waiver of any pattern-or-practice claim, and in any event were insufficient to satisfy the elements of a disparate-treatment claim on behalf of a specific individual.[4] In addition, given that none of the claimants had applied within 300 days of the EEOC's charge, Joe's argued that the action was time-barred under the 300-day rule of §706 of Title VII, 42 U.S.C. §2000e-5(e)(1). Moreover, absent any direct evidence of discrimination, Joe's also contended that this failure to apply, coupled with the uncontradicted evidence that Joe's always hired the best-qualified applicants, likewise precluded satisfaction of the EEOC's prima facie burden under the familiar *McDonnell Douglas* framework.[5] The Court of Appeals accepted every one of

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[4] Joe's also protested that the finding of systemic discrimination was not supported by any evidence – no direct evidence (*see* App. 10, 21, 183), no statistical evidence (*see supra* note 2), no anecdotal evidence, and no evidence of any kind concerning the one individual who did the hiring during the period in question. *See infra* note 14.

[5] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). The district court had not mentioned *McDonnell Douglas* or the 300-day rule.

these arguments, but nevertheless upheld two of the disparate-treatment judgments,[6] on the ground that the EEOC had proved a pattern or practice of systemic discrimination (the claim which it had waived), which had deterred the two claimants from applying, and that such proof obviated the statutory requirement of proving at least one act of discrimination within 300 days of the EEOC's charge.

The Court's Transposition of the Pattern-or-Practice Framework in Evaluating the EEOC's Prima Facie Case and the 300-Day Rule. The court in *Joe's II* agreed that the EEOC had claimed only disparate treatment of four individuals, and "did not allege pattern-or-practice discrimination" (App. 3 & n. 1). It agreed with the district court (*see* App. 180) that there was "no direct evidence of intentional discrimination toward any of the four claimants between August 29, 1990 and June 25, 1991. Thus, the EEOC's case must be premised on circumstantial evidence and the *McDonnell Douglas* framework" (App. 10). It also agreed that "[i]n a traditional failure-to-hire case, the plaintiff establishes a prima facie case by demonstrating," among other things, that "she applied and was qualified for a position for which the employer was accepting applications . . . " (App. 10). Here none of the four applicants had applied within the 300 days before the EEOC's charge – between August 29, 1990 and June 25, 1991 (App. 13).

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[6] The appellate court held that two of the four remaining claimants lacked a "real and present interest", and vacated their judgments (App. 14-15).

Nevertheless, having gratuitously revived the disparate-treatment claim in *Joe's I*, the Court in *Joe's II* again rescued the EEOC. Eschewing its own prior rejection of reputation evidence in *Joe's I*, the court in *Joe's II* held that a disparate-treatment claimant can establish a prima facie case of disparate treatment even if she did not apply for a job, by substituting the "futile gesture" theory for her burden of proof – that is, by proving a pattern or practice of discrimination and testifying that she had had a "real and present interest" in the position, but had "refrained from applying due to a justifiable belief that the employer's discriminatory practices made application a futile gesture" (App. 12). This imported the unpleaded method for proving a pattern or practice – the claim which the EEOC had waived – as a substitute for establishing a prima facie disparate-treatment case. On this basis, the court held, the district court's finding of a pattern or practice, coupled with the hearsay evidence of Joe's reputation, was sufficient to satisfy the EEOC's threshold burden even in a disparate-treatment case (App. 13-17).[7]

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[7] For the same reason, the court also held that such a showing satisfied the 300-day statutory requirement, even in a disparate-treatment case. It agreed that the only claim asserted, disparate treatment, is not a "continuing violation" (App. 7-8), but rather a "discrete, one-time employment event[ ]" (App. 8); and that "the EEOC had to show acts of intentional discrimination injuring each of the four claimants that occurred [within 300 days of] the filing of the [EEOC] charge on June 25, 1991" (*id.*). It also agreed that "none of the four claimants" had "applied for a food server position at Joe's during the time period between August 29, 1990 and June 25, 1991" (App. 12). But it held that its transposition of the pattern-or-practice framework likewise imported the analysis of the 300-day requirement theretofore applicable only in a pattern-or-practice case. It said that Joe's 300-day argument "is not concerned with procedure ... so much as it is

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The Court's Transposition of the Pattern-or-Practice Framework in Shifting the Burden of Proof to Joe's in Rebuttal. The court in *Joe's II* acknowledged that in a disparate-treatment case, *McDonnell Douglas* provides that if the claimant establishes a prima facie case, the employer may rebut by offering a "legitimate, non-discriminatory reason" for not hiring the applicant, in which case the claimant can meet its burden only by "show[ing] that the proffered reason really is a pretext for unlawful discrimination" (App. 9-10). The court also acknowledged that none of the claimants had applied within 300 days of the EEOC's charge – that is, at Joe's October, 1990 roll call (App. 12), and that "Joe's did produce [uncontradicted] evidence in an attempt to show that, in the years the claimants actually applied, they were not as qualified as the individuals hired" (App. 11 n. 6).[8] Absent any rebuttal, plus the uncontradicted evidence

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concerned with the substance of the EEOC's proof. . . . For this reason, we think that Joe's timeliness argument is subsumed within our discussion of the merits" (App. 6 n. 3). Thus the court held that proof of systemic discrimination within 300 days satisfies the 300-day rule even in a disparate-treatment case.

[8] Joe's evidence was uncontradicted that Joe's always hired the best qualified applicants (*see* R23-1972-73). Joe's evidence was also uncontradicted that when each of the claimants eventually did apply for a server position, she was passed over for better qualified applicants. *See* R15-200, 220; R16-281-82, 292-93, 295, 304, 330, 334, 355, 364, 369-70, 409, 412; R17-538, 572, 592, 680; R18-741-44, 760, 794-95, 803, 809; R19-1031-32, 1064; R20-1174-76, 1178-81, 1185-86; R22-1718; R23-1971-72, 1976; R24-2015-16, 2033, 2097, 2122; R36-33, 38-39, 55, 92; R37-394, 421-22, 428, 481; R38-707; R43-1722, 1829, 1860-61, 1895-96; R44-1930, 1935-36, 1972-73. When claimants Stratford and Romanello applied (twice) after 1990, Joe's was still hiring females in direct proportion to the percentage of female applicants (*see* App. 36, 46-52). The EEOC made no effort to rebut this evidence.

that Joe's always hired the best applicants, including the October 1990 roll call (*see supra* note 8), these acknowledgments should have necessitated judgment for Joe's on the disparate-treatment claim.

Instead, the appellate court rescued the EEOC for the third time. Notwithstanding its acknowledgment of the *McDonnell Douglas* paradigm in a disparate-treatment case, the court again borrowed the unpleaded pattern-or-practice framework. Although the court couched its holding in the language of disparate treatment ("Joe's did not offer evidence of a legitimate, non-discriminatory reason relative to the October 1990 roll call," App. 16-17), in fact it imported a standard of proof and a temporal focus which is only applicable in a pattern-or-practice case. The court held that Joe's uncontradicted defense was "not relevant", "[b]ecause none of the claimants actually applied until after the EEOC filed its charge of discrimination" (App. 11 n. 6) (a fact which should have required judgment for Joe's). It held that because the claimants had been excused (post facto) from establishing their prima facie case by its importation of the pattern-or-practice theory, so too the burden of proof was shifted to the employer in rebuttal – a construct hitherto applicable only in the remedial stage of a pattern-or-practice case – to prove that it hired more qualified applicants during the period of time in which the claimant says she was deterred from applying. Thus, to establish a legitimate non-discriminatory reason for not hiring the claimants (the disparate-treatment paradigm), Joe's had to prove that even at a time that the claimants did not apply, the servers who were hired were better qualified (the pattern-or-practice defense, after classwide discrimination has been proved).

Not surprisingly, given that the EEOC had never advanced (and had waived) any such theory of liability, Joe's had never mounted such a defense. The court said that Joe's had introduced "no evidence whatsoever to explain why it failed to hire any of the four claimants . . . between August 29, 1990 and June 25, 1991" (App. 11) – that is, "no evidence" to explain why Joe's had not hired four people who did not apply for the job. Having thus converted the EEOC's disparate-treatment claim into the very pattern-or-practice claim which it had waived, the court held that Joe's deliberate and systematic exclusion of women had created a reputation for discriminating which had deterred two of the claimants from applying in October of 1990, and that this evidence supported their judgments for disparate treatment (App. 15-17).

REASONS FOR GRANTING THE PETITION

The Court of Appeals erred fundamentally in importing the pattern-or-practice framework into the EEOC's pleaded disparate-treatment claim, retroactively validating a judgment based on a theory of liability which 7 Courts of Appeals have held does not apply to individual claims, and which Joe's never had a chance to rebut.

1. Individual Claimants May Not Bring a Pattern-or-Practice Claim.

Pattern-or-practice liability and disparate-treatment liability are separate and qualitatively different causes of action under different statutory provisions -- §707 of Title VII, 42 U.S.C. §2000e-6(a) and §703, 42 U.S.C. §2000e-2(a)

respectively – embracing radically different substantive elements and objectives.[9] Because §707 proscribes systemic, institutional discrimination, each of the 7 Courts of Appeals to address the issue has held that a pattern-or-practice claim is available only to governmental or class-action plaintiffs, but not to individual claimants or their surrogates.[10] The court said in *Lowery*, 158 F.3d at 761: "[B]ecause the Supreme Court has never applied the *Teamsters* [*International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)] method of proof in a private, non-class action for employment discrimination, and because the nature of the proof and remedies in class and government pattern or practice actions differs vis-a-vis private, non-class actions, we decline to give individual plaintiffs a pattern or practice cause of action or allow them to use the *Teamsters* method of proof." The court said

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[9] *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) ("manifest" and "crucial" difference between the two causes of action). *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 267 (1989) (O'Connor, J., concurring) ("I do not suggest the wholesale transposition of rules from one setting to the other . . . ").

[10] *See Lockridge v. Board of Trustees University of Arkansas*, 294 F.3d 1010, 1015 (8th Cir. 2002); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1106 (10th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 2614 (2002); *Celestine v. Petroleos de Venezuela S.A.*, 266 F.3d 343, 355-57 (5th Cir. 2001); *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 711 (2nd Cir. 1998); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999), *reinstated in relevant part*, 206 F.3d 431, 437 (4th Cir.), *cert. denied*, 531 U.S. 822 (2000); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866 n. 6 (7th Cir. 1985); *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531 (9th Cir. 1982); *Scarlett v. Seaboard Coast Line R. Co.*, 676 F.2d 1043, 1053 (5th Cir. 1982). *See generally* 1 L.K. Larson, *Employment Discrimination* §8.02, at 8-27-8-31 (2nd ed. 1997); B. Schlei & P. Grossman, *Employment Discrimination Law* 1322 n. 9 (2nd ed. 1983).

in *Babrocky*, 773 F.2d at 866 n. 6: "Plaintiffs' use of 'pattern-or-practice' language also seems to be misplaced, since such 'suits by their very nature, involve claims of classwide discrimination," B. Schlei & P. Grossman, Employment Discrimination Law 1322 n. 95 (2d ed. 1983), and the five plaintiffs, while attacking policies that would have affected all of [the defendant's] women employees as a class, have stated only their individual claims, not a class action."

The court said in *Celestine*, 266 F.3d at 355: "The pattern and practice method of proof is almost exclusively used in class actions, with individual racial discrimination plaintiffs confined to the *McDonnell Douglas* framework. . . . Given the nature and purpose of the pattern and practice method of proof, this Court's precedents, and the precedents of other circuits, the district court did not err in refusing to apply the *Teamsters* method of proof as an independent method of proof to the appellants' individual claims in lieu of the *McDonnell Douglas* method. . . . " The court said in *Scarlett*, 676 F.2d at 1053:

> Cross-appellants have attempted to convince us that their suit is a "pattern and practice claim," in which proof of a pattern of unlawful discrimination is established at the first, or liability, phase of trial and issues of individual entitlement to relief are reserved for the second stage. That label is inaccurate as applied to this case and cannot alter the fact that plaintiffs . . . must prove their claim that they were discriminatorily refused positions. . . . This is not a "pattern and practice" suit by the government under section 707, 42 U.S.C. §2000e-6, in which the government may postpone until the "remedial" stage of trial proof that each individual for whom it seeks

> relief was discriminatorily denied an employment opportunity. [Citing *Teamsters*]. Nor is this is a private class action, in which a similar manner of proceeding with the production of evidence is appropriate. See Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed.2d 444 (1976). An individual proceeding as an individual under Title VII must prove the elements of a discriminatory hiring claim as set forth in McDonnell Douglas. This the cross-appellants failed to do.

Professor Larson writes, *supra* note 10, that "the Court in *Teamsters* was not laying down rules for private, non-class actions. . . . It would be unthinkable to routinely permit non-applicant plaintiffs in individual suits to recover back pay, retroactive seniority, and the like based on what amounts to mere speculation that they would have been rejected for discriminatory reasons had they applied." Yet that is what the Court of Appeals held in this case.

2. The Court of Appeals Improperly Imported the Pattern-or-Practice Standard as a Substitute for Establishment of the EEOC's Prima Facie Case in a Disparate-Treatment Case.

This Court has noted repeatedly that a disparate-treatment claim challenges "an employment decision" directed toward a specific individual. *International Brotherhood of Teamsters v. United States*, 431 U.S. at 358. *Accord, Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984). This defines the claim and also defines its elements. In a disparate-treatment case, §706 of Title VII, 42 U.S.C. §2000e-5(e)(1), requires proof that at least one "discriminatory act" – a concrete example of the wrong asserted – took place within 300 days of the

filing of the EEOC's charge.[11] Even in cases which, unlike this one (*see* App. 7-8), charge a continuing violation, the claimant still must prove that she was victimized by at least one specific act of the alleged discrimination within the statutory period. *National Railroad Passenger Corp. v. Morgan, supra* note 11, 122 S. Ct. at 2072. And likewise on the merits, as the Court of Appeals acknowledged, absent direct evidence, a disparate-treatment claimant must establish the prima facie case prescribed in *McDonnell Douglas* (*see* App. 10). Under that formulation, the "ultimate burden . . . remains at all time with the plaintiff," *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), and the "ultimate issue" is "whether the particular employment decision at issue was made on the basis of" a protected status. *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984). By definition, except in two narrow circumstances not present here, to establish a prima facie case the claimant must prove that she applied for the job in question. *McDonnell Douglas*, 411 U.S. at 802.[12] Such proof is necessary to "eliminate[ ]

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[11] *National Railroad Passenger Corp. v. Morgan*, ___ U.S. ___, 122 S. Ct. 2061, 2072 (2002). *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1992); *Delaware State College v. Ricks*, 449 U.S. 250, 257-58 (1980); *United Airlines, Inc. v. Evans*, 431 U.S. 553, 557-60 & n. 9 (1977).

[12] The requirement of application is excused only if the employer has no formal application procedure or concealed the availability of job openings, *see Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1133 (11th Cir. 1984); or where the claimant offers direct evidence of a discriminatory practice which specifically affected the individual claimants – like a statutory violation. *See Hailes v. United Airlines*, 464 F.2d 1006 (5th Cir. 1972). Here there was no direct evidence of discrimination (*see* App. 10, 21, 183), and Joe's annual roll call was "widely known" to all of the claimants (App. 11; *see Joe's I*, 220 F.3d at 1279).

the most common non-discriminatory reasons" for an employer's decision – that there was no job opening or that the claimant did not apply. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). Therefore, an inference of discrimination can arise only after proving the elements required to establish the prima facie case prescribed in *McDonnell Douglas*: "A prima facie case under *McDonnell Douglas* raises an inference only because we presume [that the defendant's] acts, if not otherwise explained, are more likely than not based on impermissible factors . . . when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978).[13] In the absence of such a showing, a disparate-treatment claim must be denied. *St. Mary's Honor Center v. Hicks*, 409 U.S. 502, 506-07 (1993). Under the established formulation, therefore, the claimants' failure to apply within 300 days should have required dismissal of the EEOC's disparate-treatment claim.

Instead, the Court of Appeals ostensibly established a third exception (*see supra* note 12) to the prima facie requirement of proof that the claimant applied for the job, by allowing an individual claimant to prove – without pleading – that she was victimized by a pattern or practice

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[13] *See International Brotherhood of Teamsters v. United States*, 431 U.S. at 358 n. 44; 1 L.K. Larson, *Employment Discrimination* §8.02[2] at 8-30-8-31 (2d ed. 1997) ("In an individual disparate treatment suit, the fact of application, along with the other elements of a prima facie case, is used to prove both the existence of discrimination and the consequential injury to the plaintiffs"), *cited in Brown v. Coach Stores, Inc.*, 163 F.3d at 711.

of discrimination. It held that when the claimant proves that discrimination was the company's "standard operating procedure," *Teamsters*, 431 U.S. at 336, such proof will obviate the requirement to make a prima facie case (in part by proving that she applied for the job) if she offers evidence heretofore reserved for the remedial stage of a pattern-or-practice case – that the defendant's "consistently enforced discriminatory policy" had deterred her from making the "futile gesture" of applying. *Teamsters*, 431 U.S. at 365-66. *See* App. 12-17. And as we noted, the Court of Appeals also relieved the EEOC of its burden of timeliness by importing the pattern-or-practice theory, under which proof of an ongoing discriminatory practice satisfies the 300-day rule (App. 6 n. 3). This was tantamount to allowing the individual claimants to prosecute a pattern-or-practice claim under §707, which 7 federal appellate courts have disallowed.[14]

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[14] We do not concede that the EEOC's evidence was even remotely sufficient to prove such a claim – a point which we will argue if the Court accepts review of this case. Proof of a pattern or practice requires evidence that discrimination was the defendant's "standard operating procedure," *Teamsters*, 431 U.S. at 336, based on either direct evidence of ongoing class-wide discrimination (there was none here, *see* App. 10, 20, 183); a specific statutory violation (again, none here); or statistical evidence coupled with compelling (not just "isolated" or "sporadic") anecdotal evidence of specific instances illustrating the alleged pattern or practice, *Teamsters*, 431 U.S. at 336. Here the asserted direct evidence – constituting "almost all of the evidence of intentional discrimination", App. 69 – was rejected by the district court (*see* App. 20, 183); there was no statistical disparity, *see supra* note 2; there was no anecdotal evidence; and there was no evidence of discrimination by the person at Joe's who did the hiring during the period in question – only some general comments by other people about the "'fine-dining ambiance' [of] all-male food service." App. 15. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring)

(Continued on following page)

3. The Court of Appeals Impermissibly Transferred to Joe's the Burden of Proof Heretofore Applicable Only in a Pattern-or-Practice Case, in the Remedial Stage After Proof of Systemic Discrimination.

The difference between the two types of claims is also reflected in the allocation of the burden of proof. In a disparate-treatment case, the "ultimate burden" of persuasion "remains at all times with the plaintiff," *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254. If the plaintiff makes a prima facie showing under *McDonnell Douglas*, the employer's only obligation is to "articulate some legitimate, non-discriminatory reason for the [claimant's] rejection."[15] The proffer of such an explanation, with "no credibility assessment," shifts the burden back to the claimant.[16] The plaintiff then must prove that

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("statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" cannot satisfy plaintiff's burden). These generalized comments, which were introduced only as background evidence in support of the EEOC's disparate-treatment claims, could not, standing alone, support a judgment for pattern-or-practice discrimination. But no other evidence of any kind was introduced. It was not an oversight that the EEOC chose not to bring a pattern-or-practice claim.

[15] *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253-55. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000); *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978); *McDonnell Douglas*, 411 U.S. at 802.

[16] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 142, *citing Burdine*, 450 U.S. at 254, *and quoting St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). Indeed, in *McDonnell Douglas*, this Court disapproved of the Eighth Circuit Court's rejection (in an opinion written by Judge Bright, who sat as a visiting judge in the instant case), of the employer's proffered reason for not hiring the plaintiff, on the ground that it was "subjective," not "objective," and therefore

(Continued on following page)

the reason given is "a pretext for discrimination"[17] – that it is "unworthy of credence" and seeks "to cover up a discriminatory purpose."[18]

In contrast, proof of classwide discrimination in a pattern-or-practice case imposes a far-more onerous burden on the defendant. When the claimant proves that classwide discrimination was the employer's standard operating procedure, *Teamsters*, 431 U.S. at 368-69 nn. 52, 53, and that she would have applied but for that systemic practice, then in the remedial stage the employer's burden is not merely to proffer a non-discriminatory reason, but to prove that more qualified people were selected. *Id.* at 369 n. 53.

In the instant case, in the reasonable belief that it was defending against a disparate-treatment claim, Joe's proved 1) that none of the claimants had applied within 300 days of the EEOC's charge (which alone should have been dispositive); and 2) that Joe's always hired the most qualified applicants (*see* R23-1972-73). And as further support, Joe's proved that when the 4 claimants did

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"carries little weight in rebutting charges of discrimination." 463 F.2d 337, 343 (8th Cir. 1973), *quoted in McDonnell Douglas*, 411 U.S. at 803-04. *See also Burdine*, 450 U.S. at 256-57 (court of appeals erred in placing "on the defendant the burden of persuading the court that it had convincing, objective evidence for preferring the chosen applicant above the plaintiff").

[17] *Burdine*, 450 U.S. at 253, *quoted in Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 143. *Accord, St. Mary's Honor Society v. Hicks*, 509 U.S. at 517-18.

[18] *Reeves*, 530 U.S. at 143, 147. *See St. Mary's Honor Society v. Hicks*, 409 U.S. at 517-20; *Aiken v. United States Postal Service Board of Governors*, 460 U.S. 714, 716 (1981).

apply – at a time when Joe's hiring continued to perfectly match the female applicant pool – Joe's hired better qualified applicants in their place (*see supra* note 8). Under the *McDonnell Douglas* framework governing a disparate-treatment case, this shifted the burden back to the EEOC, which offered no response, thus requiring judgment for Joe's on the disparate-treatment claim.

Instead, as we noted earlier, the Court of Appeals dismissed Joe's legitimate non-discriminatory reasons by finding them irrelevant to its newly-invented pattern-or-practice theory (App. 11 & n. 6). Although it spoke in the language of disparate treatment (App. 16-17: "Joe's did not offer evidence of a legitimate, non-discriminatory reason relative to the October 1990 roll call"), it applied that language to a time when none of the claimants applied for jobs; it borrowed the pattern-or-practice construct in relying upon the district court's holding that they were deterred from applying by Joe's reputation; and it required Joe's to prove that if the applicants had applied at the October 1990 roll call, they still would have lost out to better-qualified applicants.[19] Here too, therefore, the Court of Appeals substituted the pattern-or-practice theory, which numerous appellate decisions have held is unavailable to an individual claimant.

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[19] As we noted earlier, Joe's did in fact offer unrebutted testimony that it always hired the best qualified applicants (*see* R23-1972-73).

4. The Court of Appeals Violated Joe's Right to Due Process by Affirming the Disparate-Treatment Judgment on the Unpleaded Pattern-or-Practice Theory.

Even if an individual claimant were permitted to plead and prosecute a pattern-or-practice theory of liability, the EEOC's judgment in this case cannot be defended on any such basis because the EEOC did not plead, and in fact waived, a pattern-or-practice claim. In holding otherwise, the Court of Appeals effectively expanded the EEOC's judgment, by retroactively amending its complaint.

The fundamental elements of procedural due process are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). All of the rules relating to the amendment of pleadings – at the trial level under Rule 15(b), Fed. R. Civ. P., and at the appellate level – are limited by this requirement. At the trial level, had the EEOC intended to prosecute a pattern-or-practice claim, it was required either to plead §707 of Title VII specifically, or to allege a pattern-or-practice violation. *See Spiller v. City of Texas City Police Department*, 130 F.3d 162, 167 (5th Cir. 1997). In the absence of such a pleading, under Rule 15(b), the district court could enter judgment on such a theory only if it were tried by implied consent, through the introduction of unchallenged evidence which could only be relevant to the unpleaded claim, thus necessarily giving notice to Joe's. *See Old Republic Ins. Co. v. Employers Reinsurance Corp.*, 144 F.3d 1077, 1080-81 (7th Cir. 1998); *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc.*, 833 F.2d 1484, 1487 (11th Cir. 1987). Here the EEOC did not move to amend, and any such motion would have been foreclosed

by its repeated disclaimers and by Joe's repeated reminders that no such claim was before the court (*see supra* p. 4). Therefore no amendment was permissible, and the district court was precluded from entering judgment on an unpleaded claim without amending the pleadings. *See* Rule 15(b); *Elmore v. Corcoran*, 913 F.2d 130, 172 (4th Cir. 1990); *Luria Brothers & Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1083 (2nd Cir. 1986). All of these rules are grounded in the fundamental requirements of due process: "It offends elemental concepts of procedural due process to grant enforcement to a finding neither charged in the complaint nor litigated at the hearing." *NLRB v. H.E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962).[20]

This is equally true at the appellate level. This Court has held repeatedly that in the absence of a cross-appeal, an appellate court may affirm only on theory which will not expand the scope of the judgment affirmed.[21] In the instant case, therefore, in the absence of a cross-appeal, the Court of Appeals could not affirm a judgment entered on one theory of liability on the basis of another theory which was not pleaded and in fact was waived. And Joe's invoked and relied upon those waivers throughout the

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[20] *Accord, Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992); *United States for the Use and Benefit of Seminole Sheet Metal Co. v. SCI, Inc.*, 828 F.2d 671, 677 (11th Cir. 1987); *Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 164 (8th Cir. 1968); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 861 (2nd Cir. 1966).

[21] *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n. 14 (1985); *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); *United States v. Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977); *Helvering v. Pfeiffer*, 302 U.S. 247, 250-51 (1937).

trial. *See supra* p. 4. But that is precisely what the Court of Appeals did in this case.

The result was that Joe's was retroactively condemned by a theory of liability against which it never had the opportunity to defend. Confronted only with the pleaded disparate-treatment claim on behalf of 5 individuals, Joe's properly devoted its defense to the disclaimer of any direct or circumstantial evidence concerning those 5 individuals. It focused on the fact that none of the 5 claimants had applied for server positions within 300 days of the EEOC's charge; that Joe's always hired the best-qualified applicants, including the October 1990 roll call; that it had always employed female servers; that both of the claimants who recovered had been turned down in favor of better applicants; and that its hiring of women perfectly matched the female applicant pool. It did not focus upon any evidence of its institutional or historic character; upon the hearsay evidence of its reputation (which was not admitted to prove its truth anyway); or upon the qualifications of those hired at the October 1990 roll call, when the 5 claimants were not applicants for server positions. None of these issues was argued by either side, was considered by the district court, or was even discussed in the appellate briefs.

In short, Joe's was blindsided by the Court of Appeals' spontaneous, uninvited post facto rationalization for the district court's judgment. If the rules of due process have any meaning, then the Court of Appeals violated those rules.

CONCLUSION

For the reasons expressed above, it is respectfully submitted that the Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12917

D.C. Docket No. 93-01082 CV-DTKH

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

versus

JOE'S STONE CRABS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed July 12, 2002)

Before TJOFLAT, COX and BRIGHT*, Circuit Judges.

PER CURIAM:

Joe's Stone Crab, Inc. ("Joe's") appeals the district court's entry of judgment in favor of the Equal Employment Opportunity Commission ("EEOC") on the EEOC's

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* Honorable Myron H. Bright, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

claims, under Title VII, that Joe's intentionally discriminated against four female applicants – Carol Coyle, Raquel Munoz, Catherine Stratford, and Teresa Romanello. Although none of these women actually applied for a position during the actionable time period, the district court found that Joe's was liable because its discriminatory hiring practices during that time period deterred the women from applying. Because this finding is not supported with respect to Coyle and Munoz, we reverse the district court's judgment as to those applicants. By contrast, the record does support the district court's finding as to Stratford and Romanello. We affirm the district court's judgment as to Stratford; as to Romanello, we vacate and remand for the district court to recalculate damages.

I. Background

The facts and procedural history of this case, which is making its second appearance before this court, are described thoroughly in the opinion of the previous panel. *See EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000). Accordingly, we note only that background relevant to our decision in this appeal. This case began on June 25, 1991, when an EEOC Commissioner filed a discrimination charge against Joe's pursuant to sections 706 and 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 & § 2000e-6. The charge alleged that Joe's discriminated against women generally with respect to recruitment, hiring, and job assignments, but it did not allege discrimination against any specific individual. (R.5-137, Ex. A.) After investigating the allegations made in the charge, the EEOC issued a decision finding that Joe's had engaged in a pattern and practice of intentional discrimination against women by failing to recruit and hire them

as wait staff. (R.5-137, Ex. B at 6.) As required by Title VII, *see* 42 U.S.C. § 2000e-5(b), Joe's and the EEOC attempted to conciliate the findings made in the Decision, but their efforts proved unsuccessful.

Thereafter, on June 8, 1993, the EEOC filed a complaint in federal court pursuant to § 706, 42 U.S.C. § 2000e-5(f), alleging that Joe's violated Title VII through both intentional disparate treatment discrimination and unintentional disparate impact discrimination. The complaint, however, did not allege that Joe's engaged in a pattern and practice of discrimination, the type of discrimination specifically referenced in the EEOC's Decision. The EEOC subsequently filed an amended complaint in response to Joe's motion for a more definite statement. Like the original complaint, the amended complaint alleged disparate treatment discrimination and disparate impact discrimination, but it did not allege pattern and practice discrimination.[1] Unlike the original complaint, however, the amended complaint identified eighteen individuals allegedly aggrieved by the employment practices at Joe's. (R.1-38, Ex. A.) Among the individuals identified were Raquel Munoz, Catherine Stratford, and Carol Coyle, three of the claimants whose claims are at issue in this appeal. (*Id.*) The fourth claimant, Theresa Romanello, was identified later in the proceedings.

The district court held a bench trial on liability, after which it entered a partial judgment in favor of the EEOC, making factual findings and conclusions of law with

[1] In fact, the EEOC expressly stated before both the district court and this court that this was not a pattern and practice case.

respect to Joe's hiring practices. *See EEOC v. Joe's Stone Crab, Inc.*, 969 F. Supp. 727 (S.D. Fla. 1997). Since the late 1970s, the owners of Joe's have delegated authority to hire new food servers to subordinate staff. *See id.* at 731. Food servers generally are hired at a "roll call," held every year on the second Tuesday in October. Although Joe's rarely advertises, the district court found that the roll call was "widely known throughout the local food server community." *Id.* at 733. In addition, there existed a "widely-held belief among workers in the Miami food serving industry" that Joe's did not hire women to fill food server positions. *Id.* Between 1986 and 1990, Joe's hired 108 new food servers, all of whom were male. *Id.* The district court rejected the EEOC's disparate treatment claims on the ground that the EEOC had not proven intentional discrimination. *See id.* at 735. The district court found, however, that Joe's nonetheless was liable for disparate impact discrimination because its delegation of hiring authority to subordinate staff resulted in a statistical disparity between the available female labor pool and the number of females actually hired by Joe's. *See id.* at 736-40. With liability determined, the district court then held another bench trial, this time on remedies, and entered judgments awarding back pay and prejudgment interest to Stratford, Munoz, Coyle, and Romanello. The district court also ordered extensive injunctive relief with respect to Joe's hiring practices.[2]

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[2] The district court primarily required that Joe's follow certain court-ordered hiring procedures and allow a court-appointed monitor at its roll calls through January 1, 2001. The requirements set out by the district court have been completed, and this injunctive relief is not at issue in this appeal.

Joe's appealed the district court's entry of judgment on the disparate impact claims, as well as the imposition of monetary and injunctive relief. The EEOC also filed a notice of appeal; however, this court subsequently dismissed that cross-appeal pursuant to the EEOC's own motion. Instead of pursuing the cross-appeal, the EEOC argued that, if the judgment could not be affirmed for the reasons articulated by the district court (i.e., unintentional disparate impact), it nonetheless could be affirmed on the alternative basis that Joe's had discriminated against the claimants intentionally (i.e., intentional disparate treatment). This court rejected the district court's finding of disparate impact and vacated its judgment of liability as to the EEOC's disparate impact claims. *See Joe's,* 220 F.3d at 1283. But, concluding that the district court's factual findings might support a finding of intentional discrimination, the court remanded the case to the district court to "make such factual findings and draw such conclusions of law about the EEOC's intentional discrimination claims as it may deem appropriate." *Id.* at 1287.

On remand, without holding a hearing or receiving supplemental briefing or argument from the parties, the district court determined that the EEOC proved its claim of intentional disparate treatment discrimination. *See EEOC v. Joe's Stone Crab, Inc.,* 136 F. Supp. 2d 1311, 1313 (S.D. Fla. 2001). Reiterating certain of its previous factual findings, and reaffirming all others, *see id.* at 1312-13, the district court then entered an amended final judgment, again awarding back pay and prejudgment interest to Stratford, Munoz, Coyle, and Romanello. Joe's appeals.

II. Standard of Review

In considering the district court's judgment, we review its factual findings for clear error and its legal conclusions de novo. *See, e.g., Joe's,* 220 F.3d at 1273; *Wilson v. Minor,* 220 F.3d 1297, 1301 (11th Cir. 2000). We review the district court's award of back pay for abuse of discretion. *See EEOC v. Guardian Pools, Inc.,* 828 F.2d 1507, 1511 (11th Cir. 1987).

III. Discussion

Joe's asserts two primary challenges to the district court's judgment. First, Joe's contends that the district court erred in finding it liable for disparate treatment discrimination because the evidence is insufficient to support that finding with respect to any of the four claimants at issue. Second, Joe's contends that, even assuming that the EEOC established disparate treatment liability as to the four claimants, the district court erred in its determination of damages and prejudgment interest.[3]

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[3] In addition to its arguments about liability and damages, Joe's argues that the district court erred in entering judgment for the EEOC because the discrimination charge, as it relates to the disparate treatment claims, was untimely under 42 U.S.C. § 2000e-5(e)(1). We think, however, that Joe's argument in this regard is not concerned with procedure – i.e., whether the charge was filed timely – so much as it is concerned with the substance of the EEOC's proof – i.e., whether the EEOC proved an act of intentional discrimination against each of the four claimants within the actionable period established by § 2000e-5(e)(1). For this reason, we think that Joe's timeliness argument is subsumed within our discussion of the merits.

A. *Liability*

1. Actionable Period

At the outset, we must establish the appropriate temporal reach of the EEOC's disparate treatment claims. Section 706 of Title VII, the statute under which the EEOC brought this action, requires that a plaintiff, including the EEOC itself, exhaust certain administrative remedies before filing a suit for employment discrimination. *See generally* 42 U.S.C. § 2000e-5; *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1317 (11th Cir. 2001). The administrative process is initiated by timely filing a charge of discrimination. *See* 42 U.S.C. § 2000e-5(b); *Wilkerson*, 270 F.3d at 1317. For a charge to be timely in a deferral state such as Florida, it must be filed within 300 days of the last discriminatory act. *See* 42 U.S.C. § 2000e-5(e)(1). Accordingly, only those claims arising within 300 days prior to the filing of the EEOC's discrimination charge are actionable. *See Nat'l R.R. Passenger Corp. v. Morgan*, ___ S.Ct. ___, No. 00-1614 (June 10, 2002); *Taylor v. Hudson Pulp & Paper Co.*, 788 F.2d 1455, 1458 (11th Cir. 1986). Because the EEOC filed its charge on June 25, 1991, discriminatory acts occurring prior to August 29, 1990 are outside the scope of this action.

The EEOC, however, argues that the discrimination in this case constituted a continuing violation, which extended the limitations period beyond August 29, 1990. In determining whether a discriminatory employment practice constitutes a continuing violation, "we must distinguish between the present consequence of a one-time violation, which does not extend the limitations period, and the continuation of the violation into the present, which does." *See Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 796 (11th Cir. 1992) (internal quotations

omitted). The disparate treatment claims asserted by the EEOC fall into the former category. The alleged acts at issue – the failure to hire the claimants because they were women – were discrete, one-time employment events that should have put the claimants on notice that a cause of action had accrued. *See Morgan,* ___ S. Ct. at ___ ; *see also Clark v. Olinkraft, Inc.,* 556 F.2d 1219, 1222 (5th Cir. 1977) (suggesting that failure to hire does not constitute continuing violation);[4] *East v. Romine, Inc.,* 518 F.2d 332, 336-37 (5th Cir.), *overruled on other grounds, Burdine v. Texas Dep't of Community Affairs,* 647 F.2d 513 (5th Cir. 1975), (holding that district court should not have considered plaintiff's failure to hire claims arising prior to limitations period). Accordingly, the continuing violation doctrine does not extend the actionable time period beyond August 29, 1990, and the EEOC had to show acts of intentional discrimination injuring each of the four claimants that occurred between that date and the filing of the charge on June 25, 1991.[5]

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[4] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the Former Fifth Circuit handed down prior to October 1, 1981.

[5] Although all of the claimants applied and were rejected for food server positions at Joe's after June 25, 1991, the EEOC does not explicitly argue on appeal that the ending date of the actionable period should be extended to encompass these post-charge events. Because this issue has not been presented squarely, we need not address it. We note, however, that Title VII requires a charge to be filed "after the alleged unlawful employment practice occurred," 42 U.S.C. § 2000e-5(e)(1), and that "'[o]ccurred' means that the practice took place or happened in the past." *Morgan,* ___ S. Ct. at ___; *see also id.* at ___ ("Each discrete act starts a new clock for filing charges alleging that act.").

2. The Legal Framework

As explained above, this appeal involves only claims of disparate treatment discrimination, i.e., that Joe's intentionally discriminated against Stratford, Munoz, Coyle, and Romanello by failing to hire them on account of their gender. *See Joe's,* 220 F.3d at 1273 (explaining that disparate treatment claims require proof of discriminatory intent). Whether an employer intentionally discriminated against an employee or potential employee is a question of fact, which may be proved either through direct or circumstantial evidence. *See Green v. Sch. Bd. of Hillsborough County,* 25 F.3d 974, 977-78 (11th Cir. 1994). "Direct evidence of discrimination is evidence, that, 'if believed, proves [the] existence of [a] fact in issue without inference or presumption.'" *Schoenfeld v. Babbitt,* 168 F.3d 1257, 1266 (11th Cir. 1999) (quoting *Burrell v. Bd. of Trustees of Ga. Military College,* 125 F.3d 1390, 1393 (11th Cir. 1997)) (alterations in original).

Absent such evidence, a plaintiff may prove its case through circumstantial evidence, using the familiar burden-shifting framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817 (1973), and subsequent cases. Under this framework, the plaintiff initially must establish a prima facie case of discrimination. *See id.* at 802, 93 S. Ct. at 1824. By establishing a prima facie case, the plaintiff creates a rebuttable presumption that the employer unlawfully discriminated against her. *See United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 714, 103 S. Ct. 1478, 1481 (1983). The burden then shifts to the employer to rebut this presumption by producing evidence that its action was taken for some legitimate, non-discriminatory reason. *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S.

248, 254-55, 101 S. Ct. 1089, 1094 (1981). Should the employer meet its burden of production, the presumption of discrimination is rebutted, and the inquiry "proceeds to a new level of specificity," in which the plaintiff must show that the proffered reason really is a pretext for unlawful discrimination. *See id.* at 255-56, 101 S. Ct. at 1095-96. Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the plaintiff. *See id.* at 253, 101 S. Ct. at 1093; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 2106 (2000).

3. Analysis

a. Prima Facie Case and Futile Gesture Doctrine

Having reviewed the record, we find no direct evidence of intentional discrimination toward any of the four claimants between August 29, 1990 and June 25, 1991. Thus, the EEOC's case must be premised on circumstantial evidence and the *McDonnell Douglas* framework. In a traditional failure-to-hire case, the plaintiff establishes a prima facie case by demonstrating that: (1) she was a member of a protected class; (2) she applied and was qualified for a position for which the employer was accepting applications; (3) despite her qualifications, she was not hired; and (4) the position remained open or was filled by another person outside of her protected class. *See Schoenfeld,* 168 F.3d at 1267. Joe's contends that the EEOC failed to establish a prima facie case of discrimination because none of the claimants applied for a job at Joe's during the actionable period. The EEOC, on the other hand, maintains that the issue in this appeal is not

whether it established a prima facie case, but whether the district court, having considered all of the evidence as the trier of fact, clearly erred in its ultimate finding that Joe's intentionally discriminated against the claimants. Thus, before addressing the district court's finding of liability, we must determine the exact question before us.

The EEOC correctly points out that, when a defendant fails to persuade the district court to dismiss the action for lack of a prima facie case and responds to the plaintiff's proof by offering evidence of a non-discriminatory reason for its actions, the presumption of discrimination established under the *McDonnell Douglas* framework "drops from the case." *See Aikens,* 460 U.S. at 715, 103 S. Ct. at 1481. Put differently, "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *Id.,* 103 S. Ct. at 1482. In this case, however, Joe's did not satisfy its burden of producing evidence of legitimate, non-discriminatory reasons with regard to the actionable period defined above. Joe's offered no evidence whatsoever to explain why it failed to hire any of the four claimants during the period between August 29, 1990 and June 25, 1991.[6] Rather, throughout these proceedings, Joe's has asserted that the claimants' failure to apply during the 300 days preceding the charge is fatal to the EEOC's

[6] Joe's did produce evidence in an attempt to show that, in the years the claimants actually applied, they were not as qualified as the individuals hired. Because none of the claimants actually applied until after the EEOC filed its charge of discrimination, however, this evidence is not relevant to the alleged acts of discrimination occurring within the actionable period.

claims. The question before us, then, is whether the district court, as the trier of fact, clearly erred in finding that the EEOC's prima facie case as to each claimant is supported by a preponderance of the evidence. *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 509-10 & n.3, 113 S. Ct. 2742, 2748 n.3 (1993).[7]

It is undisputed that none of the four claimants applied for a food server position at Joe's during the time period between August 29, 1990 and June 25, 1991. Specifically, none of the claimants applied at Joe's October 1990 roll call, the only time during the actionable period in which Joe's hired food servers. Contrary to the argument advanced by Joe's, however, this is not the end of the matter. Our precedent demonstrates that a non-applicant may nonetheless establish a prima facie case by showing that she refrained from applying due to a justifiable belief that the employer's discriminatory practices made application a futile gesture. *See Taylor,* 788 F.2d at 1462; *Hailes v. United Air Lines,* 464 F.2d 1006, 1008 (5th Cir. 1972). To have a "justifiable belief" for purposes of this exception to the application requirement, a person must demonstrate: (1) that she had a real and present interest in the job for which the employer was seeking applications; and (2) that

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[7] In any event, even had Joe's met its burden of production, we could still consider evidence concerning the EEOC's prima facie case in considering the ultimate question of intentional discrimination. *See Reeves,* 530 U.S. at 143, 120 S. Ct. at 2106 (explaining that trier of fact may consider evidence establishing prima facie case when determining issue of pretext); *Alexander v. Fulton County,* 207 F.3d 1303, 1335 (11th Cir. 2000) (same); *Green,* 25 F.3d at 978-80 (considering whether plaintiff established prima facie case in analyzing whether district court's finding of intentional discrimination was supported by substantial evidence).

she would have applied for the job but effectively was deterred from doing so by the employer's discriminatory practices. *See Hailes,* 464 F.2d at 1008. In this case, the EEOC had to show that these criteria were satisfied as to each of the four claimants at issue.

b. Real and Present Interest

We conclude that the EEOC did not meet its burden of showing that Coyle and Munoz possessed real and present interests in food server positions at Joe's during the actionable period. Coyle, for example, did not apply to Joe's until sometime in the fall of 1991, and there is no indication that she ever contemplated applying at any earlier date. In fact, the district court awarded damages to Coyle based solely on her 1991 application, without any finding that she would have applied earlier. (R.11-324 at 12-13.) Munoz likewise did not apply until the fall of 1991, but the district court found that Munoz intended to apply "long before the October 1989 roll call." (R.11-324 at 10.) Whatever Munoz's intention prior to 1989, however, we have found no evidence that Munoz had a real and present interest in applying at Joe's at the October 1990 roll call. The only specific dates mentioned by Munoz were 1983, when she first wanted to apply but refrained because she thought she was too young, and 1991, when she actually applied. (R.18 at 583-84.) Although Munoz testified that she refrained from applying prior to 1991 because she heard that Joe's did not hire women (R.18 at 584), this testimony does not reveal what specific dates between 1983 and 1991 she contemplated applying. Because the EEOC failed to demonstrate that Coyle and Munoz had real and present interests in applying at the 1990 roll call, its prima facie case as to these claimants was not

supported by a preponderance of the evidence, and the district court clearly erred in finding otherwise.

By contrast, the record sufficiently supports a finding that Stratford and Romanello both possessed a real and present interest in applying during the actionable period. Although Stratford did not actually apply until October 1991, she testified that she moved from New Jersey to Miami Beach in 1990 with the intention of attending Joe's roll call that year. (R.17 at 323, 326-28.) Similarly, even though Romanello did not apply until October 1993, she testified that she first looked into working at Joe's several years earlier, making inquiries about the roll calls throughout the years from 1989 to 1993. (R.16 at 200; R.38 at 396.)

c. Effective Deterrence by Discriminatory Practices

Having established that Stratford and Romanello had real and present interests in applying at Joe's during the actionable period, the EEOC had to show that these claimants effectively were deterred from applying at the 1990 roll call by Joe's discriminatory hiring practices. Both Stratford and Romanello testified that they failed to apply during the actionable period because they were informed by acquaintances in the Miami Beach restaurant community that Joe's did not hire women. (R.17 at 325-27; R.38 at 396-97.) This testimony supports a finding that these claimants effectively were deterred by Joe's reputation for discriminatory hiring practices. The only question is whether the evidence supports a finding that this reputation was caused or perpetuated by Joe's. *See Joe's,* 220 F.3d at 1281 (explaining that employer may be held liable

for discriminatory reputation only if it caused or perpetuated such reputation through some intentional affirmative act). We think that it does.

The district court specifically found that, although Joe's did not have an express policy of excluding women from food server positions, it nonetheless had an implicit policy to that effect. *See Joe's,* 136 F. Supp. 2d at 1312-13. According to the district court's factual findings, the owners delegated complete authority over hiring decisions to subordinates who "deliberately and systematically excluded women from food server positions based on a sexual stereotype which simply associated 'fine-dining ambience' with all-male food service." *Id.* at 1313. Moreover, although not directly involved in the hiring process, the owners, "through their silence, consented to the deliberate and systematic exclusion of women from the serving staff." *Id.* Finally, the district court found that it was this implicit consent that caused the reputation that Joe's discriminated against women. *Id.*

These findings are supported adequately by the record. Roy Garrett, the night maitre d' at Joe's with authority to hire and supervise food servers, explained that male servers were the "accepted thing" at Joe's. (R.22 at 1483.) Garrett further testified: "It was always tradition from the time I arrived there that it was a male server type of job. And until just recently when we became aware that we had to do other things, . . . originally it was traditionally a male place." (R.22 at 1484-85.) Garrett also testified that, in his opinion, Joe's predominantly male wait staff was part of the reason that few women applied for food server positions. (R.22 at 1485-86.) The day maitre d', Anthony Arenson, who also had hiring and supervisory authority over food servers, testified that gender was

never mentioned at Joe's because "many fine dining establishments throughout the world have an all male staff. I think it was a perception that people didn't even think about." (R.25 at 2057.)

Arenson also testified about the specifics of the hiring process. According to Arenson, applicants were judged according to four factors: appearance, articulation, attitude, and application. (R.18 at 678; R.24 at 1969.) Arenson admitted, however, that the assessment of these factors was a subjective process, based on the individual interviewer's "gut-feeling." (R.19 at 699; R.25 at 2002-04.) Arenson also testified that Joe's had no female food servers in 1990, and no females were hired as food servers during any of the years from 1987 to 1990. (R.19 at 793, 814.) Robert Moorehead, the general manager at Joe's since 1986, similarly testified that he could not remember any women being hired as food servers from 1986 to 1990, and that this paucity of female food servers did not strike him as odd. (R.22 at 1467.) Nonetheless, Dennis Sutton, a lunch captain who was actively involved in the interview process in 1990, testified that women can perform the job of food server satisfactorily, and Garrett testified that Joe's "always had women that were qualified women." (R.22 at 1413, 1428, 1485.) Based on this testimony, we cannot say that the above-referenced factual findings are clearly erroneous.

Accordingly, we conclude that the record adequately supports a finding that Stratford and Romanello would have applied in October 1990, but were deterred from doing so by discriminatory hiring practices at Joe's. The EEOC thus satisfied its prima facie case as to these two claimants. Because Joe's did not offer evidence of a legitimate, non-discriminatory reason relative to the October

1990 roll call, the district court's determination that these claimants were subjected to unlawful discrimination must be sustained. *See St. Mary's,* 509 U.S. at 510 n.3, 113 S. Ct. at 2748 n.3 (explaining that if trier of fact finds that prima [sic] case is supported by preponderance of the evidence, and defendant fails to meet its burden of producing evidence of non-discriminatory reason, then fact-finder must find unlawful discrimination and render verdict for plaintiff).

B. *Damages*

That brings us to Joe's arguments regarding the damages awarded to Stratford and Romanello.[8] Joe's contends that neither Stratford nor Romanello complied with the district court's order to produce accurate tax returns, and for this reason, these claimants may not recover back pay. Additionally, Joe's maintains that the district court erred both in crediting the back pay calculation of the EEOC's expert economist and in compounding interest. These arguments are meritless and do not warrant further discussion. The district court did not abuse its discretion for any of the reasons advanced by Joe's.

Nonetheless, we must vacate the district court's award of damages as to Romanello. In calculating damages for this claimant, the district court awarded back pay beginning in October 1989. As we have explained, the only roll call within the actionable period occurred in October 1990. On remand, the district court should use this date as the

[8] Because we conclude that the district court's liability determination with respect to Munoz and Coyle was in error, we need not consider the damages awarded to those claimants.

starting point for its calculations of Romanello's damages. Because the district court used October 1990 as the starting point for calculating Stratford's back pay, we affirm the district court's award to this claimant.

IV. Conclusion

We affirm the district court's judgment as to Stratford and reverse that judgment as to Coyle and Munoz. We vacate the judgment as to Romanello and remand for recalculation of damages to be awarded to her.

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

CASE NO.: 93-1082-CIV-DTKH

vs.

JOE'S STONE CRAB, INC.,

Defendant.
_____/

ORDER ON REMAND

THIS CASE is before the court upon remand from the United States Court of Appeals for the Eleventh Circuit. *See EEOC v. Joe's Stone Crab., Inc.*, 220 F.3d 1263 (11th Cir. 2000) (mandate reissued December 14, 2000). The appellate court ruled, as a matter of law, the record evidence does not support a finding of disparate impact discrimination. Consequently, the Circuit Court reversed and vacated this court's judgment. However, because some of this court's factual findings indicated facially-discriminatory practices by Joe's, and because the appellate court perceived this court may have labored under an erroneous view of Title VII case law, the Eleventh Circuit remanded the case for reconsideration of the EEOC's intentional discrimination claim.

In light of the Eleventh Circuit's clear pronouncement that "[t]o prove the discriminatory intent necessary for a disparate treatment . . . claim, a plaintiff need not prove that a defendant harbored some special "animus" or "malice" towards the protected group to

which she belongs," *Id.* at 1283-84, this court vacates its previously announced conclusions that (1) "The EEOC has not met its burden of proof under disparate treatment analysis," *EEOC v. Joe's Stone Crab, Inc.*, 969 F.Supp. 727, 735 (S.D. Fla. 1997), and (2) "the EEOC has not proved intentional discrimination." *Id.* at 730.

Supplemental & Restated Findings of Fact

Furthermore, to aid the appellate court in any subsequent review, this court makes the following supplemental and restated findings of fact:

1. The testimony of Cathy Evans, Cassandra Williams and Barbara Mommsen to the effect that owners and managers of Joe's stated they would not hire female food servers was not credible. For this reason the court found, and today reaffirms, that Joe's owners and managers did not have an *express* policy of excluding women from food server positions.

2. "As previously found by the court, 'what prevailed at Joe's, albeit not mandated by written policy or verbal direction, was the ethos that female food servers were not to be hired.' And, in fact, they were not. Prior to the EEOC's intervention, female applicants for food server positions at Joe's had no reasonable likelihood of being hired." *EEOC v. Joe's Stone Crab, Inc.*, 15 F.Supp. 1364, 1369 (S.D. Fla. 1998) (*quoting EEOC v. Joe's Stone Crab, Inc.*, 969 F.Supp. 727, 732 (S.D. Fla. 1997).

3. Joe's owners delegated complete authority to subordinates to make hiring decisions for food server positions.

4. Joe's subordinate employees, exercising delegated authority, deliberately and systematically excluded women from food server positions based on a sexual stereotype which simply associated "fine-dining ambience" with all-male food service. Thus, the court previously found that "Joe's sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu." *EEOC v. Joe's Stone Crab, Inc.*, 969 F.Supp. 727, 733 (S.D. Fla. 1997).

5. Although not involved in individual food server hiring decisions, Joe's owners and managers, through their silence, consented to the deliberate and systematic exclusion of women from the serving staff. "Despite what should have been apparent, management never voiced concern nor questioned the hiring staff's decisions. . . . In this environment, management's silence conveyed approbation." *EEOC v. Joe's Stone Crab, Inc.*, 15 F.Supp. 1364, 1369 (S.D. Fla. 1998).

6. Joe's *implicit* policy of hiring only male food servers gave rise to a deserved, well-known reputation that Joe's discriminated against female food servers. This reputation, in turn, caused many qualified females not to apply at Joe's for food server positions.

7. the court reaffirms all prior findings of fact set forth in the two previous opinions rendered in this case.

Conclusion of Law

Based upon the evidence presented at both trials, together with these supplemental and restated findings, in addition to all prior findings rendered in this case,

the court concludes that the plaintiff Equal Employment Opportunity Commission has established by a preponderance of the evidence that defendant Joe's Stone Crab, Inc. engaged in intentional disparate treatment sex discrimination. Accordingly, it is

ORDERED, ADJUDGED and DECREED that all monetary judgments together with injunctive and other relief set forth in this court's court's [sic] Memorandum Opinion on Monetary Damages and Injunctive Relief, dated August 12th, 1998, are ratified and reinstated.

DONE and SIGNED in Chambers at West Palm Beach, Florida, this 23rd day of March, 2001.

/s/ Daniel T. K. Hurley
Daniel. T. K. Hurley
United States District
Judge

Copies provided to:
Gedety Serralta, Esq.
Robert D. Soloff, Esq.
Joel S. Perwin, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12917-II

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Plaintiff-Appellee,

versus

JOE'S STONE CRABS, INC.

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Dec. 19, 2002)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19 ___, ____F.2d ____).

Before: TJOFLAT, COX and BRIGHT*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

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* Honorable Myron H. Bright, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. Cox
UNITED STATES
CIRCUIT JUDGE

ORD-42
(12/01)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-1082-CIV-HURLEY

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

plaintiff,

vs.

JOE'S STONE CRAB, INC.,

defendant /

AMENDED FINAL JUDGMENT ON DAMAGES & COSTS

(Filed May 7, 2001)

Based upon the order on remand entered March 23, 2001, which ratified and reinstated the relief granted in this court's prior memorandum opinion on monetary damages and injunctive relieve [sic] entered August 12, 1998, and pursuant to prior order of court entered August 31, 1998 establishing amount of prejudgment interest on monetary damage awards, and order entered June 14, 1999 establishing taxable costs, final judgment on money damages and costs is hereby entered in this action as follows:

1) Claimant Catherine Stratford shall take and recover judgment from defendant Joe's Stone Crab, Inc. in the amount of $71,149 for damages, and $25,977.48 for prejudgment interest, for a total of $97,126.48, which shall bear interest at the rate prescribed by 28 U.S.C.

§ 1961 from the date of entry of original judgment (August 31, 1998) for which let execution issue.

2) Claimant Raquel Munoz shall take and recover judgment from defendant Joe's Stone Crab, Inc. in the amount of $35,230 for damages and $14,213.54 for prejudgment interest, for a total of $49,443.54, which shall bear interest at the rate prescribed by 28 U.S.C. § 1961 from the date of entry of original judgment (August 31, 1998), for which let execution issue.

3) Claimant Carol Coyle shall take and recover judgment from defendant Joe's Stone Crab, Inc. in the amount of $15,313 for damages and $6,570.46 for prejudgment interest, for a total of $21,883.46, which shall bear interest at the rate prescribed by 28 U.S.C. § 1961 from the date of entry of original judgment (August 31, 1998) for which let execution issue.

4) Claimant Teresa Romanello shall take and recover judgment from defendant Joe's Stone Crab Inc. in the amount of $32,513 for damages and $10,837.49 for prejudgment interest, for a total of $43,350.49, which shall bear interest at the rate prescribed by 28 U.S.C. § 1961 from the date of entry of original judgment (August 31, 1998) for which let execution issue.

5) Plaintiff, Equal Employment Opportunity Commission shall take and recover judgment from defendant Joe's Stone Crab, Inc. for taxable costs in the amount of $48,051.171, [sic] which shall bear interest at the rate prescribed by 28 U.S.C. § 1961 from the date of entry of original cost judgment (June 14, 1999) for which let execution issue.

DONE AND SIGNED in Chambers at West Palm Beach, Florida this 5th day of May, 2001.

/s/ Daniel T. K. Hurley
Daniel. T. K. Hurley
United States District
Judge

Copies furnished:
Gedety Serralta, Esq.
Robert D. Soloff, Esq.
Joel S. Perwin, Esq.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-5367

D.C. Docket No. 93-1082-CV-DTKH

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

JOE'S STONE CRAB, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 4, 2000)

Before BLACK, HULL and MARCUS, Circuit Judges.

MARCUS, Circuit Judge:

This is the paradigmatic "hard" case, and we have labored for many months to reach the right result. On appeal, Defendant, Joe's Stone Crab, Inc. ("Joe's"), challenges the district court's entry of judgment in favor of Plaintiff, the Equal Employment Opportunity Commission (the "EEOC"), on its gender-based disparate impact claims under Title VII. Joe's is a landmark Miami Beach seafood restaurant which from 1986 to 1990 hired 108 male food servers and zero female food servers. After the EEOC filed its discrimination charge in June 1991, Joe's hired 88 food servers from 1991 to 1995, nineteen, or roughly 21.7%, of

whom were female. The district court concluded that while Joe's was not liable for intentional discrimination, it was liable for disparate impact discrimination based on these statistical disparities. After thorough review, we vacate the district court judgment, and remand for reconsideration of the EEOC's intentional discrimination claim consistent with this opinion.

In our view, the facts of this case render a disparate impact finding inappropriate. A disparate impact claim requires the identification of a specific, facially-neutral, employment practice causally responsible for an identified statistical disparity. On this record, the district court has identified no *facially-neutral* practice responsible for the gender disparity in Joe's food server population and we can find none. However, some of the district court's subsidiary findings suggest that there may have been *facially-discriminatory* practices of Joe's that were responsible for the identified hiring disparity, although the district court expressly rejected the EEOC's intentional discrimination claim in summary fashion. Several powerful prudential considerations, including the fact that the record is replete with conflicting witness testimony permitting more than one resolution of this claim, and the fact that some of the district court's subsidiary factual findings are in apparent conflict with its conclusion that Joe's was not liable for intentional discrimination, persuade us that the wisest course is a remand to the district court so that it may consider further its factual findings and conclusions of law in light of this opinion.

I.

The facts of this case are reasonably straightforward and are fully outlined by the district court in *EEOC v.*

Joe's Stone Crab, Inc., 969 F. Supp. 727 (S.D. Fla. 1997). Joe's Stone Crab, Inc. is a fourth-generation, family-owned seafood restaurant and Miami Beach landmark. During the stone crab season, which lasts from October to May, the restaurant is extremely busy – serving up to 1450 patrons each weeknight and up to 1800 patrons each weekend night. Today, the restaurant employs between 230 and 260 employees; of those, approximately 70 are food servers. Throughout its history, Joe's -- a result of Joe's family ethos, generous salary and benefits package, and its seven-month employment season. From 1950 onward, however, the food servers have been almost exclusively male.

On June 25, 1991, the Equal Employment Opportunity Commission ("EEOC") filed a discrimination charge, under sections 706 and 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.*, alleging that Joe's discriminated on the basis of sex in the hiring and recruiting of food servers. On April 17, 1992, the EEOC issued its Decision, finding a pattern and practice of *intentional* sex discrimination in Joe's hiring and recruiting practices. Specifically, the EEOC determined that a word-of-mouth recruiting system and Joe's *reputation* for hiring only male food servers resulted in almost no women actually applying for food server positions at Joe's. The EEOC also found that Joe's subjective hiring practices were responsible for the gross statistical disparity between the percentage of female food servers in the Miami Beach community and the percentage of female food servers working at Joe's. As required by Title VII, *see* 42 U.S.C. § 2000e-5(b), the EEOC and Joe's attempted to conciliate the Decision's findings but were unsuccessful.

On June 8, 1993, the EEOC filed a complaint in the Southern District of Florida alleging that Joe's violated Title VII through both intentional disparate treatment discrimination as well as unintentional disparate impact discrimination. The gravamen of the complaint centered around the EEOC's findings with respect to Joe's hiring and recruiting practices for food servers. The EEOC sought permanent injunctive relief, back pay, and pre-judgment interest for qualified claimants.[1] Over fifteen days interspersed from August 1996 to December 1996, the district court held a liability bench trial. The analysis at trial focused on two discrete time periods: first, the pre-EEOC charge period from 1986 to 1990; and finally, the post-EEOC charge period from 1991 to 1995. On July 3, 1997, the district court issued a partial final judgment – – making a series of factual findings with respect to Joe's employment practices. *See Joe's Stone Crab,* 969 F. Supp. at 727-35.

To hire new food servers, Joe's conducts a "roll call" every year on the second Tuesday in October. Although Joe's rarely advertises, significantly, the district court found that the roll call is "widely known throughout the local food server community," and typically attracts over 100 applicants for only a limited number of slots. *Joe's Stone Crab,* 969 F. Supp. at 733. At a typical roll call, each applicant completes a written application and an individual interview. Selected applicants then enter a three-day training program where they shadow experienced servers.

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[1] The EEOC filed its original complaint on June 8, 1993. Joe's filed a motion for a more definite statement. In response, the EEOC amended its complaint on September 20, 1993.

Upon successful completion of the program, they then become permanent hires. *See id.*

Until the EEOC's charge, roll call interviews and hiring selections were handled exclusively by the daytime maitre d' with occasional interview assistance from other staff members.[2] Hiring decisions were made by the daytime maitre d' on the basis of four subjective factors (appearance, articulation, attitude, and experience) and without upper management supervision or the benefit of instructive written or verbal policies. *See id.* After the EEOC's discrimination charge in 1991, Joe's changed its roll call format somewhat. All applicant interviews were conducted by three members of Joe's management.[3] In addition, each applicant was required to take and pass a "tray test," which involved the lifting and carrying of a loaded serving tray, or else be automatically disqualified from a food server position. The district court found the tray test to be a "legitimate indicator of an individual's ability to perform an essential component of a food server's

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[2] In 1986, the daytime maitre d', Raymond Damiano, was responsible for interviewing and hiring new food servers, with occasional assistance from dinner maitre d' Roy Garret. Beginning in 1987, Anthony Arneson became the daytime maitre d' and was given sole responsibility for hiring new food servers, although various staff members occasionally assisted him in the interview process. Specifically, Arneson testified that from 1987 to 1990, Night Captain Dennis Sutton, Night Captain George Silas, Lunch Captain Kevin Murphy, and Maitre d' Roy Garrett all sat in on the interview process at various times and offered him their opinions on the prospective servers interviewed.

[3] After the charge was filed in 1991, management directed Arneson to conduct interviews with a panel composed of Night Captain Dennis Sutton and General Manager Robert Moorehead. *Id.* at 733. In subsequent years, both male and female employees served on the panel.

job at Joe's," *id.*, and that "women have the physical strength to carry serving trays," *id.* at 732.

In addition to its description of Joe's hiring process, the district court also made several subsidiary findings relating to the historical operation of the roll call system. The district court observed that while "women have predominated as owner/managers," "most of Joe's female employees have worked in positions traditionally viewed as 'women's jobs,' e.g., as cashiers or laundry workers. Food servers generally have been male." *Id.* at 731. Although Joe's hired female food servers during World War II, most of these positions "reverted to men at the conclusion of the war." *Id.* Further, the district court found that, "[f]rom 1950 on, the food serving staff has been almost exclusively male. Indeed, one striking exception proves the rule. Dotty Malone worked as a food server at Joe's for seventeen years, and for most of this time she was the lone female on a serving staff that ranged between twenty-four and thirty-two." *Id.*

In explaining this historical dearth of female food servers, the district court found that Joe's maintained an "Old World" European tradition, in which the highest level of food service is performed by men, in order to create an ambience of "fine dining" for its customers. *Id.* at 733. The district court elaborated:

> The evidence presented at trial does not establish that Joe's management had an express policy of excluding women from food server positions. To the contrary, the evidence portrays owner/managers who have been courageous in opposing overt discrimination. For example, Joe's was picketed for two years when the owners insisted on hiring African-American employees who had

> been excluded from union membership because of race. What the evidence in this case does prove is that Joe's management acquiesced in and gave silent approbation to the notion that male food servers were preferable to female food servers.

Id. at 731. As evidence for this finding, the district court cited three pieces of witness testimony. First, the district court pointed to the testimony of Grace Weiss, Joe's owner, who stated, "I cannot explain the predominance of male servers, but perhaps it has to do with the very heavy trays to be carried, *the ambience of the restaurant,* and the extremely low turnover in servers." *Id.* at 731-32 (emphasis added by the district court). Second, the district court highlighted the testimony of Roy Garrett, a longtime maitre d' of Joe's with hiring authority, who explained that Joe's had a "tradition" that food server positions were "a male server type of job":

> As I said before, we had very few female applicants over the years. It was sort of a tradition. . . . *It was always tradition* from the time I arrived there *that it was a male server type* of job. And until just recently when we became aware that we had to do other things, . . . originally *it was traditionally a male place. We always had women that were qualified women.* . . . Traditionally, I mean, it's just some restaurants, when you walk in, you know there are going to be women waitresses, other restaurants you know it is going to be male waiters.

Id. at 732 (emphasis added).[4] Finally, the district court referred to the testimony of Joe's own restaurant industry expert, Karen McNeil, for a historical explanation of the "male-only" server tradition.

> It has been an attitude and standard, it comes from Europe. In all of Europe you will find in all of the grade three restaurants in Europe, there is an impression that service at that high level is the environment of men, and that it ought to be that way. And I think that that attitude a few decades ago came and was felt a little bit here in this country . . . . Those [European] opinions and those sensibilities, I think were in fact carried here by restauranteurs who hoped to create something serious. If you wanted to create a serious restaurant that would become known in the community, that would become one of the community's great restaurants, you did what they did in Europe, you modeled yourself after them. I don't think anybody thought about it. They said, well, men did it there. It tended to be men here, too, who had those skill sets, and so men were [sic] automatically became the labor pool.

Id. The district court added that "Joe's [had] sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu." *Id.*

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[4] Similarly, Anthony Arneson, the maitre d' in charge of hiring beginning in 1987, testified that gender was never mentioned by Joe's managers or employees because of a "perception that people didn't even think about . . . that many fine dining establishments throughout the world have an all male staff."

With this historical background in place, the district court then focused on Joe's female hiring statistics for the relevant pre- and post-charge periods. For the pre-charge period of 1986-1990, the number of female food server applicants at Joe's annual hiring roll calls was minuscule. While there is little available evidence as to the actual numbers of female applicants at these roll calls (because Joe's historically did not retain any employment data from its roll calls), the district court determined, and both parties agreed, that during this period, no more than two or three women per year (or, at most, 3% of the overall applicant class) actually attended the roll calls. *See id.* at 733. In that same period, 108 new male food servers were hired while *zero* women were hired. *See id.* During the post-charge period (from 1991 to 1995), many more women (in all, 22% of the actual applicant pool) applied for food server positions. Of Joe's 88 new food server hires during this period, 19 were women. These post-charge figures translate into a female hiring percentage of 21.7% -- a percentage almost exactly proportional to the percentage of females in the actual applicant pool. *See id.* at 733-34. Joe's female applicant flow data for the post-charge period breaks down the following way:

Season	Women applicants	Women hired
1991-92	15.1%	20.0%
1992-93	21.9%	22.7%
1993-94	23.0%	10.5%
1994-95	26.8%	35.3%
Oct. -- Dec. 1995	23.3%	20.0%
Average	22.02%	21.7%

Id. at 734.

However, in making its findings, the district court found this actual applicant flow data "unreliable because

it is skewed." *Id.* at 734. Relying on hearsay trial testimony from local female food servers, the district court found that Joe's public reputation for not hiring women encouraged women to self-select out of the hiring process -- thereby skewing the actual applicant flow.[5] *See id.* at 733-34. The district court explained:

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[5] At the liability trial, thirteen witnesses testified that Joe's had a reputation in the Miami server community for hiring only men as servers. For example, Catherine Stratford testified that she moved from New Jersey to Miami Beach to attend Joe's "roll call" in 1990. After her move, she did not apply because her roommate told her that Joe's did not hire female servers. In addition, Barbara Mommsen testified that "it was common knowledge that they [Joe's] didn't hire women at the time" and that "Joe's had a reputation of being one of the best restaurant jobs to get if you were a man. As far as being a woman, you need not apply." The district court later concluded:

> As the court detailed in its findings of fact, Joe's has been a 'male server type' establishment for the better part of this century. While women have predominated among Joe's owner/managers, as well as among the laundry, cashiering, and take away staff, women have systematically been excluded from the most lucrative entry level position, that of server. So accepted was this practice that Joe's general manager, Robert Moorehead, candidly admitted that it never occurred to him that something might be wrong when 108 positions were filled sequentially with male applicants between 1986 and 1990. Many witnesses testified that, as a result of this known practice, Joe's created a reputation for not hiring women servers and thereby induced qualified women to self-select out of the applicant pool at roll call. As a result, the roll call became skewed and remains skewed to the present day.
>
> By failing to address its entrenched reputation and the resulting effect on the roll call, Joe's leaves undisturbed a significant factor causing the ongoing exclusion of women from server positions. Unless and until Joe's takes reasonable steps to confront the reputation it has created, it will

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In the preceding findings, the court held that Joe's reputation in the community, which reflected the restaurant's historical hiring practice, led potential female applicants not to apply for server positions. Joe's reputation, therefore, was largely responsible for the gender skew in the pool of applicants at the annual roll call. It is well-settled that an employer's reputation for discriminatory hiring practices can lead to a self-selected applicant pool not reflective of the actually available labor pool. Quite irrespective of the intentions of the employer, a rational qualified female candidate is likely to self-select out of the application process, declining to make what she considers a 'futile gesture.' Thus, the existence of such a reputation is highly relevant to whether Joe's actual applicant flow data reflects the available labor pool. Put more narrowly, evidence of Joe's reputation in the food serving community was admitted as highly relevant to whether, how, and why would-be applicants were chilled from applying for traditionally male jobs. While Joe's vehemently contested the admissibility of this reputation evidence, its objections fall wide of the mark. They presuppose that evidence of Joe's reputation was offered as proof of conduct consistent with the reputation, as proof of Joe's hiring practices themselves, or as proof of bad character or intent to discriminate. None of these is the case. Evidence of Joe's reputation was admitted solely to establish the existence of the reputation, and not for any other purpose.

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continue to experience skewed applicant pools at its annual roll call.

Id. at 740.

Id. at 736 (internal citations omitted). Although the district court noted that female food server applications to Joe's dramatically increased as a result of publicity about the EEOC charge, it still found Joe's post-charge applicant pool data (depicting a female applicant pool of 22%) unreliable after comparing it with hiring rates, between 30% and 40% female, for other area seafood restaurants.[6] *See id.* at 734.

Having found the actual applicant pool data wholly unreliable, the district court discarded it and then set about selecting alternative non-applicant labor market data. The EEOC's expert witness, a labor economist, suggested a qualified female labor pool of 44.1% based on 1990 census data for female food servers living and/or working in the Miami Beach area (a labor pool which included cocktail and buffet servers). *See id.* at 734-35. Not surprisingly, the district court rejected this figure in part because there was no demonstration that this female labor pool necessarily was qualified to work at Joe's. Instead, the district court "refined" the relevant labor pool to include all female servers who lived or worked on Miami Beach and earned between $25,000 and $50,000 -- thereby "using past earning capacity as a proxy for experience, and by extension, experience as a proxy for qualification." *Id.* at 735. Solely based on this alternative methodology, the

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[6] Specifically, the district court found that, as of 1991, the Rusty Pelican had a 35.9% female wait staff; the 94th Aerosquadron had a 42.1% female wait staff; and Southpointe Seafood had a 29.5% female wait staff. We note, however, that unlike Joe's, two of these restaurants, the Rusty Pelican and the 94th Aerosquadron, are not located on Miami Beach.

district court was able to find "that at all relevant times, 31.9% of the available labor pool has been female." *Id.*

With these findings in place, the district court then drew two pertinent conclusions of law. First, the district court summarily rejected the EEOC's disparate *treatment* claims without analysis, stating only that "the court finds that the EEOC has not met its burden of proof under disparate treatment analysis." *Id.* at 735. The only other mention of the disparate treatment claims is found in the introduction of the district court's opinion. There, the district court unambiguously states: "[b]ased on an evaluation of the evidence, the court finds that the EEOC has not proven intentional discrimination." *Id.* at 730. Second, however, the district court determined that Joe's was liable for disparate impact discrimination.[7] *See id.* Specifically, the district court found that "the challenged employment practice in this case . . ., [Joe's] undirected and undisciplined delegation of hiring authority to subordinate staff," *id.* at 738, was responsible for the statistical disparity between the 31.9% female "available" labor pool and Joe's female hiring rates in the pre-charge (0%) and post-charge (21.7%) periods, *id.* at 739-40. The district court then entered a partial judgment of liability in favor of the EEOC.

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[7] Although not originally included in the amended complaint, at the conclusion of the trial, the EEOC moved to amend its complaint to include an allegation that the subjective interviewing process had an adverse effect on women. The district court granted the motion and denied Joe's corresponding motion to strike this claim. Joe's has not specifically challenged these rulings on appeal.

On April 15, 1998, a bench trial was held on the remedies portion. The EEOC presented five female plaintiffs who unsuccessfully applied for food server positions at Joe's in the 1990's. They testified that they would have applied to Joe's at an earlier juncture but for the fact that they knew applying was futile based on Joe's male-only reputation. The district court awarded four of them back-pay relief plus prejudgment interest. The district court also ordered extensive injunctive relief through the year 2001 that required Joe's to adopt a statement of non-discrimination in the hiring of food servers, comply with the district court's monitoring of Joe's future hiring and recruiting practices (including its public advertising of hiring roll-calls), allow the supervision of each roll-call by a *court-appointed* monitor, permit the introduction of a standardized tray test at the roll-call, and provide mandatory training sessions with an industrial psychologist for all of Joe's hiring decisionmakers.

II.

The first and central issue in this appeal is whether the district court erred in finding that the EEOC had established disparate impact discrimination.[8] We review

[8] Defendant Joe's raises thirteen separate issues on appeal. These issues can be divided into three broad categories: (1) whether the district court erred in failing to dismiss this action or limit the scope of the judgment based upon procedural defects; (2) whether the district court erred in finding for the plaintiff EEOC on the merits of its disparate impact claims; and (3) whether the district court erred in its calculation of damages and prejudgment interest. We find that Joe's procedural arguments clearly lack merit. Because we conclude that the district court erred in finding Joe's liable on the merits of its disparate impact claims, we need not address Joe's damages arguments.

the district court's conclusions of law *de novo,* and its factual findings for clear error. *See Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.,* 206 F.3d 1373, 1376 (11th Cir. 2000); *Hill v. Seaboard Coast Line R.R. Co.,* 885 F.2d 804, 812 (11th Cir. 1989) (citing *Eastland v. Tennessee Valley Auth.,* 704 F.2d 613, 620 (11th Cir. 1983)). In this case, where the bulk of the evidence came in the form of conflicting witness testimony, we allot even greater deference to the factfinder who is in a better position to assess the credibility of the witnesses. *See Stano v. Butterworth,* 51 F.3d 942, 944 (11th Cir. 1995) (citing *Anderson v. City of Bessemer City,* 470 U.S. 564, 575, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985)).

That said, we have struggled on appeal to find the proper resolution of this case. As we explain in detail, we believe that the district court's factual findings simply do not support a legal conclusion that Joe's is liable for *disparate impact* discrimination. Based on the district court's findings, no specific *facially-neutral* employment practice of Joe's can be *causally connected* to the statistical disparity between the percentage of women in the qualified labor pool and the percentage of women hired as food servers by Joe's.

A. Disparate Impact

Under Title VII of the Civil Rights Act of 1964, an employer may be found liable for unlawful sex discrimination under any one of three discrete theories: pattern and practice discrimination, disparate treatment discrimination, or disparate impact discrimination. Both pattern and

practice and disparate treatment claims require proof of discriminatory intent;[9] disparate impact claims do not. *See In Re Employment Litig. Against the State of Ala.*, 198 F.3d 1305, 1310 n.8 (11th Cir. 1999). In order to show discriminatory intent, a plaintiff must demonstrate " 'that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects on an identifiable group.' " *Id.* at 1321 (quoting *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979)). Therefore, in a disparate treatment case, the plaintiff bears the ultimate burden of proving that the employment action at issue was taken because of the plaintiff's sex. *See Holifield v. Reno,* 115 F.3d 1555, 1564-65 (11th Cir. 1997). Likewise, in a pattern and practice case, the plaintiff must prove, normally through a combination of statistics and anecdotes, that discrimination is the company's "standard operating procedure." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335-36, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *see also Mozee v. American Commercial Marine Service Co.,* 940 F.2d 1036, 1051 (7th Cir. 1991).

In contrast, disparate impact theory prohibits *neutral* employment practices which, while non-discriminatory on their face, visit an adverse, disproportionate impact on a statutorily-protected group. *See Griggs v. Duke Power Co.,* 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971) (explaining that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but

[9] The features of these two intentional discrimination claims are outlined in detail in Part II, Section B.

discriminatory in operation"); *see also In re Employment,* 198 F.3d at 1311; *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1117 (11th Cir. 1993). The doctrine seeks the removal of employment obstacles, not required by business necessity, which create "'built-in headwinds'" and freeze out protected groups from job opportunities and advancement. *Griffin v. Carlin,* 755 F.2d 1516, 1524 (11th Cir. 1985) (quoting *Griggs,* 401 U.S. at 431-32, 91 S.Ct. 849). As the district court correctly identified, "[t]he premise of disparate impact theory is that some employment practices, adopted without a deliberately discriminatory motive, may be the functional equivalent of intentional discrimination." *Joe's Stone Crab,* 969 F. Supp. at 735. In essence, disparate impact theory is a doctrinal surrogate for eliminating unprovable acts of intentional discrimination hidden innocuously behind facially-neutral policies or practices.

The disparate impact framework under Title VII by now is well-settled. "Since *Griggs,* Congress has codified the appropriate burdens of proof in a disparate impact case in 42 U.S.C. § 2000e-2(k) (1994), and a settled jurisprudence has arisen to implement the methodology." *In re Employment,* 198 F.3d at 1311. As correctly identified by the district court, a plaintiff in a sex discrimination suit must establish three elements: *first,* that there is a significant statistical disparity between the proportion of women in the available labor pool and the proportion of women hired; *second,* that there is a specific, facially-neutral, employment practice which is the alleged cause of the disparity; and *finally,* and most critically in this case, that a causal nexus exists between the specific employment practice identified and the statistical disparity shown. *Joe's Stone Crab,* 969 F. Supp. at 735. *See generally MacPherson v. University of Montevallo,* 922 F.2d 766, 771

(11th Cir. 1991) (citing *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 655-56, 109 S.Ct. 2115, 2124, 104 L.Ed.2d 733 (1989); *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994-95, 108 S.Ct. 2777, 2789, 101 L.Ed.2d 827 (1988)).

According to Title VII, "[i]n the first stage of a disparate impact case, the 'complaining party [must] demonstrate [ ] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.'" *In re Employment,* 198 F.3d at 1311 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)). "To 'demonstrate' means to 'meet[ ] the burdens of production and persuasion.'" *Id.* (quoting 42 U.S.C. § 2000e(m) (1994)). "In other words, in order to surmount the first hurdle in a disparate impact race discrimination case, the plaintiff must make out a prima facie case 'that [a] facially neutral employment practice ha[s] a significantly discriminatory impact.'" *Id.* (quoting *Connecticut v. Teal,* 457 U.S. 440, 446, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982)). As the Supreme Court explained in *Watson,* "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that *the practice in question* has *caused* the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson,* 487 U.S. at 994, 108 S.Ct. 2777 (emphasis added); *see also Edwards v. Wallace Community College,* 49 F.3d 1517, 1520 (11th Cir. 1995) (observing that "[a] plaintiff must identify a specific employment practice that leads to the disparate impact"); *MacPherson,* 922 F.2d at 771 (noting that "'a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack'") (internal citation omitted).

Once each of these three elements are shown, a plaintiff has established a prima facie case of disparate impact discrimination. *See Fitzpatrick,* 2 F.3d at 1117; *MacPherson,* 922 F.2d at 771. The burden of production then shifts to the defendant to establish that the challenged employment practice serves a legitimate, non-discriminatory business objective. *See Fitzpatrick,* 2 F.3d at 1117. However, even if the defendant satisfies this burden, a plaintiff may still prevail by proving that an alternative, non-discriminatory practice would have served the defendant's stated objective equally as well. *See id.* at 1118.

As for the first prong of the analysis, it is critical to observe that no statistically-significant disparity exists between the percentage of women who actually *applied* to Joe's and the percentage of women who were *hired* as servers by Joe's. The record indicates that for the pre-charge period (October 1986 to June 1991) very few female food servers applied to Joe's, "perhaps 3% of [all] applicants," *Joe's Stone Crab,* 969 F. Supp. at 734, out of an actual applicant pool of between 80 and 120 people a year.[10] In this five-year time period, 108 male food servers were hired and no women were hired. Despite the fact that no women were hired during this period, Joe's pre-charge hiring rate demonstrated no significant statistical disparity because so few women actually applied for food server

[10] The only real evidence on this point comes from Joe's Chief Financial Officer, Arnold Meyerson, who estimated that between one and three women applied each year out of a total applicant pool ranging from 80 to 120 people a year. At trial, both sides stipulated to this figure and the district court relied on this stipulation for its findings on actual applicant flow data. *See Joe's Stone Crab,* 969 F. Supp. at 734.

positions.[11] For the post-charge period (July 1991 to December 1995), the district court found that, on average, 22.02% of Joe's food server applicants were women and that Joe's hired roughly 21.7% women for these positions. Both parties admit (as they must) that, based on this record, there is *no* statistically-significant hiring disparity when the actual number of female applicants is compared to the actual number of female hires for either period.[12] In other words, Joe's hiring system did not produce a significant statistical disparity between the actual percentage of women who applied to Joe's for server positions and the percentage of women actually hired for these positions.

This insight is important for disparate impact analysis because the mere fact that Joe's hired no women in the

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[11] While it is true that during this period Joe's hired 108 men and zero women, this zero hiring percentage is deceptive. So few women applied to Joe's during this time period (perhaps one to three a year or, at most, fifteen in total as compared to 80 to 120 men or, at most, 600 men in total) that Joe's zero hiring rate is not significantly deviant from what Joe's female hiring rate ought to be according to laws of random probability (around 1.5% at best). "The mere absence of minority employees in [ ] [particular] positions does not suffice to prove a prima facie case of discrimination. . . ." *Carter v. Ball*, 33 F.3d 450, 456 (4th Cir. 1994) (citing *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 484 (9th Cir. 1983)).

[12] While we adopt a flexible approach for determining whether a particular statistical deviation is "significant" for disparate impact analysis in light of all the facts and circumstances, *see Kilgo v. Bowman Transp. Inc.*, 789 F.2d 859, 872-73 (11th Cir. 1986), on appeal, the EEOC concedes that there is no legally significant statistical disparity in either relevant time period when *actual* applicant flow data is used. Both parties' statistical experts agreed that women needed to comprise five percent of the actual applicant class (they comprised between one and three percent) to have generated a significant disparate impact in Joe's pre-charge actual hiring pool.

pre-charge period is not, alone, sufficient to impose upon Joe's Title VII liability. To hold otherwise would be to impose liability upon Joe's based on "bottom line" reasoning which the Supreme Court has expressly forbade. In *Watson,* the Supreme Court made clear that Title VII liability could not be based solely on "bottom line" statistical imbalances in an employer's workforce. *See Watson,* 487 U.S. at 992, 108 S.Ct. 2777 (explaining that it is "unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their workforces"). The Supreme Court then further explained in *Wards Cove:*

> Just as an employer cannot escape liability under Title VII by demonstrating that, 'at the bottom line,' his work force is racially balanced (where particular hiring practices may operate to deprive minorities of employment opportunities), a Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force. *As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII.*

Id., 490 U.S., at 656-57, 109 S.Ct. 2115 (internal citation omitted) (emphasis added); *see also MacPherson,* 922 F.2d at 771.

This disdain for "bottom line" reasoning reflects the belief that holding employers liable for statistical imbalances *per se* is inconsistent with Title VII's plain language

and statutory purpose. Section 703(j) of Title VII, 42 U.S.C. 2000e-2(j), in fact, explicitly rejects the notion that employers must adopt numerical hiring quotas or "grant preferential treatment . . . on account of an imbalance which may exist with respect to the total number or percentage of persons . . . in comparison with the total number or percentage . . . in any community." Based on this statutory language, the Supreme Court has interpreted this provision of Title VII to mean that employers possess no *affirmative* duty to redress workforce imbalances not attributable to their own corporate conduct. *See Watson,* 487 U.S. at 993, 108 S.Ct. 2777 (finding that employers have no duty under Title VII to ameliorate *uncaused* workforce imbalances because such a legal rule is "'far from the intent of Title VII'") (quoting *Albemarle Paper Co. v. Moody,* 442 U.S. 405, 449, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (Blackmun, J., concurring)); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577-78, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978) (finding that employers are under no affirmative duty to impose hiring quotas to reflect demographic percentages). Indeed, if employers could be held liable for an unlawful disparate impact on account of statistical workforce imbalances per se, then they would be forced to use numerical quotas and other forms of preferential treatment in their hiring and promotion policies, in express contravention of Title VII, in order to insulate themselves from the potential legal liability that would arise if their workforce demographics did not closely mirror the demographics of their surrounding community or local competitors. As a result, a plaintiff must do more than simply identify a workforce imbalance to establish a prima facie disparate impact case; it must causally connect a facially-neutral employment practice to the identified disparity.

In this case, the district court could create a statistically-significant disparity only by first throwing out the actual applicant data as a point of comparison and instead comparing the percentage of women hired for server positions at Joe's with the percentage of women in the "qualified" labor pool. The district court recognized that the number of women who actually applied for server positions at Joe's was disproportionately low when compared with the number of women in the Miami Beach area who were seemingly qualified for such positions. There was, in fact, a significant statistical disparity between the percentage of female applicants to Joe's during the pre- and post-charge periods and the percentage of female applicants to comparable area restaurants. Joe's female applicant percentage of 3% and 22.02% for the pre- and post-charge periods respectively varied sharply from the female applicant percentage of area restaurants which ranged from 29.5% to 42.1%. *See Joe's Stone Crab*, 969 F. Supp. at 734. As a result of these findings, the district court found the actual applicant flow data to be "unreliable because it is skewed." *See id.* It concluded that the data was skewed because of the pronounced self-selection of women out of Joe's hiring process. *See id.* The district court then expressly rejected the actual *applicant* flow data in favor of an *alternative* labor pool consisting of those local food servers who were theoretically "available" and "qualified" to work at Joe's.[13] After hearing testimony

[13] On appeal, Joe's challenges the district court's use of this alternative labor data as clear error. *See Kilgo*, 789 F.2d at 869-70 & n.10 (suggesting that the decision to reject actual applicant market data for alternative labor market data is necessarily fact-intensive and reviewed for clear error). Joe's contends that the district court

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from the expert witnesses of both parties, the district court arrived at an "eligible" labor pool, based on 1990 census data refined for qualification/experience on the basis of

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improperly relied on hearsay reputation evidence in finding the actual applicant flow data unreliable. Joe's also argues that the district court erred in using "refined" census data to define the relevant labor market for Miami Beach food servers qualified to work at Joe's. The district court narrowed the labor pool to those Miami Beach food servers who made between $25,000 and $50,000 -- a salary range comparable to what Joe's food servers earn. Joe's claims that the district court's methodology of using *income* as a proxy for job *qualifications* in no way assures that the labor pool actually consists only of those food servers who have the special food-serving skills requisite to work at Joe's. In the disparate impact context, we have explained that the "[d]efinition of a qualified applicant pool will shift with the nature of the job or job benefit, and the nature of the challenged employment practice at issue." *In re Employment,* 198 F.3d at 1312. We also have observed that'" [w]hen special qualifications are required to fill particular jobs,'" the use of certain statistics such as general population figures "becomes troublesome." *Id.* at 1313 (quoting *Hazelwood,* 433 U.S. at 308 n.13, 97 S.Ct. 2736); *see also Alexander v. Fulton County, Ga.,* 207 F.3d 1303, 1327-28 (11th Cir. 2000) (noting that class-based disparate treatment statistics showing that a given minority is underrepresented in the work force by comparison with the general population is generally useful only for claims involving jobs with low skill levels where the applicant pool can be considered roughly coextensive with the general population); *Peightal v. Metropolitan Dade County,* 26 F.3d 1545, 1554 (11th Cir. 1994) (stating that "for positions requiring minimal training or for certain entry level positions, statistical comparison to the racial composition of the relevant population suffices, whereas positions requiring special skills necessitate a determination of the number of minorities qualified to undertake the particular task"). We have had no prior occasion to determine specifically whether salary is an adequate proxy for food server job qualifications at a fine dining establishment. Because we conclude *infra* that the district court erred in finding that the EEOC established disparate impact discrimination, *even* if we accept the alternative labor pool data, we need not address whether the alternative labor pool selected by the district court was comprised of "qualified" potential applicants.

past earning capacity, which was 31.9% female. The district court then used this alternative labor data and compared it to Joe's actual hire statistics. By comparing Joe's pre-charge female hiring percentage (0%) with the percentage of women in the qualified labor market (31.9%), the district court created a legally-cognizable statistical disparity.[14]

Assuming this substitution of data was appropriate, in order to establish disparate impact discrimination, the EEOC still was required to show a causal link between some *facially-neutral* employment practice of Joe's and the statistical disparity.[15] In other words, the EEOC was

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[14] When this same 31.9% figure was applied to Joe's post-charge hiring statistics, a slight disparity, bordering on the significant, was found. The statistical variation was between 1.96 to 2.07 under "standard deviation" analysis. However, no particular numerical deviation is required to establish a prima facie case; instead courts employ a case-by-case approach dependent on the particularized case facts. *See Watson*, 487 U.S. at 995 n.3, 108 S.Ct. 2777. In addition, our caselaw has recognized that post-charge hiring behavior is less probative than pre-charge conduct because a business may be improving its hiring practices to avoid liability or large damages in their pending discrimination case. *See James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 325 n.18 (5th Cir. 1977); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972).

[15] In addition, because of the district court's own causation reasoning we must focus our inquiry on the alleged causes of the gender disparity in *both* Joe's applicant and hire pool. According to the district court, both disparities necessarily share the same cause since it was the disparity in Joe's applicant pool which directly led to the disparity in Joe's hire pool. Under the district court's factual findings, Joe's public reputation as a sex discriminator caused (1) a gender disparity in Joe's applicant pool which, in turn, created (2) a gender disparity in Joe's hire pool because there were so few women who actually applied to Joe's as a food server. Therefore, in order to understand the causes of

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required to prove that at least one facially neutral employment practice proximately caused the disparity. This finding is essential to avoid the potential conflation of disparate treatment and disparate impact claims. As we have noted, the central difference between disparate treatment and disparate impact claims is that disparate treatment requires a showing of discriminatory intent and disparate impact does not. *See In re Employment,* 198 F.3d at 1310 n.8. In fact, the judicial doctrine of disparate impact was created in *Griggs* specifically to redress *facially-neutral* policies or practices which visited disproportionate effects on groups protected by Title VII. The Supreme Court has explained that, "[u]nder the act, practices, procedures, or tests *neutral on their face, and even neutral in terms of intent,* cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs,* 401 U.S. at 430, 91 S.Ct. 849 (emphasis added).

Since *Griggs,* we are aware of no case in which a *facially-discriminatory* practice has been challenged successfully under a disparate impact theory. Simply put, disparate impact theory is available for the challenge of *facially-neutral* employment practices. *See, e.g., Lanning v. Southeastern Pennsylvania Transp. Auth.,* 181 F.3d 478, 485 (3rd Cir. 1999) (finding that "plaintiffs establish a prima facie case of disparate impact by demonstrating that application of a *facially neutral standard* has resulted in a significantly discriminatory hiring pattern") (emphasis added). Indeed, the district court properly recognized

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Joe's hiring pool disparity, it is essential to determine the causes of Joe's applicant pool disparity.

that "[s]ex discrimination under the theory of disparate impact occurs when a facially neutral rule or practice of the employer has a disproportionate impact on one sex. . . . To establish a prima facie case of disparate impact sex discrimination, the plaintiff must show that a *facially neutral* practice of the employer has a disproportionate impact on one sex." *Joe's,* 969 F. Supp. 2d at 735 (emphasis added).

The central problem in this case, however, is that the district court has identified no *facially-neutral* employment practice responsible for the gender disparity in Joe's food server population, and we can find none. The EEOC and the district court have identified, at most, two neutral employment practices on which to ground a disparate impact analysis: first, Joe's word of mouth recruiting, and second, Joe's "undirected and undisciplined delegation of hiring authority to subordinate staff," *Joe's Stone Crab,* 969 F. Supp. at 738, resulting in its subjective "roll call" hiring process. Disparate impact analysis fails in this case because neither neutral practice can be causally connected to the gender disparity.

First, there is no evidence that Joe's word of mouth recruiting method caused any disparity between the percentage of women in the qualified labor pool and the percentage of women actually hired by Joe's as servers. Notably, this is not a case where Joe's formal recruiting practices or its informal word-of-mouth recruiting network kept women from learning about available jobs at Joe's. *Compare United States v. Georgia Power Co.,* 474 F.2d 906, 925 (5th Cir. 1973) (finding that word-of-mouth recruiting system can operate as a "'built-in headwind'" isolating blacks from "web of information" relating to job openings). Rather, the district court specifically found quite the

opposite, namely that local female food servers *knew* about the availability of positions at Joe's and the logistical details of Joe's hiring roll calls. Indeed, it observed that although the hiring roll calls were "rarely advertised," they were "widely known [about] throughout the local food server community." *Joe's Stone Crab,* 969 F. Supp. at 733. No woman testified that she failed to apply for a position at Joe's because she was unaware of Joe's roll call method for filling openings. Plainly, the disparity between the percentage of women in the qualified labor pool and the percentage of women actually hired as servers by Joe's cannot be causally linked to Joe's word-of-mouth recruiting process because this practice in no way prevented women from applying to or being hired by Joe's.

Nor is there any evidence that Joe's facially-neutral, albeit undisciplined and subjective, hiring practices caused the disparity the district court found between the percentage of women in the qualified labor pool and the percentage of women actually hired as servers by Joe's. There is no evidence that Joe's subjective hiring criteria either caused women not to apply to Joe's or caused those who applied not to be hired. Joe's hiring roll call decisions were made through a subjective hiring process in which Joe's hiring maitre d' relied on short applicant interviews to assess an applicant's qualification based on a range of subjective factors, including "appearance, attitude, articulation, and experience." *Joe's Stone Crab,* 969 F. Supp. at 733. No witnesses testified and no evidence was presented into the record indicating that any women failed to apply to Joe's because its hiring criteria included specific judgments about an applicant's appearance, attitude, articulation, or experience. Nor was any evidence presented showing that women who did apply for server positions at

Joe's were disadvantaged by these specific hiring criteria. Indeed, as we have stated previously, there is in fact no disparity between the percentage of women who actually applied to Joe's for server positions and the percentage of women hired. Plainly, therefore, the subjective hiring criteria did not harm women once they entered the application process.[16]

The district court, recognizing that it could not causally connect Joe's neutral, albeit subjective, recruiting and hiring practices with the disparity between the percentage of women in the qualified labor pool and the percentage of women actually hired as servers by Joe's, identified Joe's *reputation* as a discriminator against women as the causal agent for the disparity. *See Joe's Stone Crab,* 969 F. Supp. at 740. For the district court, Joe's reputation for not hiring female food servers acted as the essential bridge connecting the neutral practices to the statistical disparity. In other words, according to the district court's own reasoning, it was not Joe's neutral recruiting or hiring practices that caused the disparity, but rather Joe's reputation as a discriminator against women. Because of Joe's reputation for discriminating, the district court essentially

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[16] This case differs significantly from the paradigmatic disparate impact case in which the plaintiffs show direct causation between an *objective* hiring requirement and the statistical disparity at issue. In *Griggs,* for example, the plaintiffs showed that the objective and facially neutral requirements of possessing a high school diploma and passing a general intelligence test in order to be hired or transferred to the company's more desirable departments had a disproportionate effect on white and black applicants. *See Griggs,* 401 U.S. at 430-431, 91 S.Ct. 849.

found, women did not apply to Joe's and therefore were not hired as servers.

We conclude that the district court's use of reputation was, on the face of this record, both problematic and inadequate for several independent reasons. First, reputation itself is neither a specific act or a practice. It is far more amorphous. Reputation is "'a prevalent or common belief, a general name, the opinion of a number of persons.'" *United States v. North Carolina Nat'l Bank,* 336 F.2d 248, 253 (4th Cir. 1964) (quoting *United States v. C.I.T. Corp.,* 93 F.2d 469, 471 (2nd Cir. 1937)). Reputation is the community "picture" of an individual or corporate entity formed over a number of years. *See generally Michelson v. United States,* 335 U.S. 469, 477, 69 S.Ct. 213, 93 L.Ed. 168 (1948). Reputation has never been used, as far as we can tell, as a facially-neutral employment act or practice for disparate impact purposes. In the *intentional* discrimination context, some cases have considered reputation evidence for the limited purpose of defining the parameters of Title VII remedial relief where *intentional* discrimination either has been conceded or proven and there is evidence that an employer's discriminatory practices prevented qualified applicants from applying for new jobs. *See Morrow v. Crisler,* 491 F.2d 1053, 1055-57 (5th Cir. 1974) (*en banc*) (instructing district court on remand to consider the role of Mississippi Highway Patrol Department's entrenched reputation for race discrimination -- a reputation based on their historical practice of intentional race discrimination -- in discouraging black applicants when shaping remedial recruiting policies for the Department); *see also EEOC v. Rath Packing Co.,* 787 F.2d 318, 337 (8th Cir. 1986) (explaining that reputation evidence could be considered in determining the relevant

labor market for the computation of a Title VII class backpay award given the employer's well-known historical practice of intentional sex discrimination) (citing *Teamsters v. United States,* 431 U.S. 324, 365, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). We have been pointed to *no* case, however, and can find none that has treated an employer's reputation as a discriminator as itself an act or practice for the purposes of establishing a prima facie case under a theory of disparate impact. Indeed, no case has ever used reputation as a bridge connecting a neutral hiring practice to a statistical disparity in order to establish disparate impact liability where the neutral employment practices alone did not cause the disparity.

In addition, even if reputation could somehow be used in theory as a causal bridge, in this case there is no logical or factual connection between any facially-neutral component of Joe's employment practices and Joe's reputation as a discriminator. Nothing in this record indicates that Joe's recruitment by "word-of-mouth" rather than through other recruiting mechanisms such as print or television advertising contributed in any way to Joe's reputation for discrimination. Nor is there any evidence that the use of appearance, articulation, attitude, and experience as hiring criteria contributed to Joe's reputation for discrimination. Indeed, there is no suggestion from either party that these hiring criteria are themselves somehow illegitimate or discriminatory.[17] Instead, the suggestion from

[17] We have made clear that employment decisions may legitimately be based on subjective criteria as long as the criteria are capable of objective evaluation and are stated with a sufficient degree of particularity. *See Conner v. Fort Gordon Bus Co.,* 761 F.2d 1495, 1500 (11th

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the EEOC is that these criteria are simply a cover or a smokescreen and do not reflect the real bases for Joe's hiring decisions. Rather than hiring on the bases of appearance, articulation, attitude and experience, the EEOC contends, Joe's really hired servers on the basis of sex and it is this discriminatory hiring, rather than the use of subjective hiring criteria, that arguably led to Joe's reputation as a discriminator. *See* Appellee Brief at 30-31. But, where Joe's neutral hiring and recruiting practices did not cause its reputation, we think it is wholly inappropriate to use reputation as the causal bridge connecting neutral practices to a statistical disparity for the purposes of establishing Joe's disparate impact liability. *See Lewis v. Tobacco Workers' Int'l Union,* 577 F.2d 1135, 1143 (4th Cir. 1978) (holding that an employer cannot be found liable under Title VII simply because potential minority applicants subjectively believe the company will not hire them because of their race where this belief is not attributable to the employer's conduct); *EEOC v. Sheet Metal Workers, Int'l Assoc.,* 463 F. Supp. 388, 425 (D. Md. 1978) (finding that an employer "must itself do something to violate Title VII; it does not violate Title VII because someone else thinks it has violated Title VII").

Finally, we observe that the district court expressly admitted evidence of Joe's reputation as a discriminator not for the truth of the matter asserted but only to show the state of mind of the women who failed to apply for server positions at Joe's. According to the district court, Joe's reputation was not entered into evidence "as proof of

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Cir. 1985); *Woody v. St. Clair County Comm'n,* 885 F.2d 1557, 1562-63 (11th Cir. 1989).

conduct consistent with the reputation, as proof of Joe's hiring practices themselves, or as proof of bad character or intent to discriminate" but "was admitted solely to establish the existence of the reputation." *Joe's Stone Crab,* 969 F. Supp. at 736. The district court thereby expressly refused to find any direct causal connection between any of Joe's neutral employment practices and its reputation as a discriminator.

While a company may be held liable for a discriminatory reputation if there is evidence it caused or perpetuated that reputation through some *intentional* affirmative act, *see Morrow,* 491 F.2d at 1055-57; *Rath Packing,* 787 F.2d at 337, we know of no federal circuit that has found an employer liable under Title VII on the basis of a reputation for discrimination it did not cause. *See Lewis,* 577 F.2d at 1143. Nor are we prepared to impose on an employer an affirmative duty under Title VII to ameliorate a public reputation not attributable to its own employment conduct. *See id.* (observing that "[w]e do not think a failure of the company to announce innocence is a violation of Title VII"); *see also Sheet Metal Workers, Int'l Assoc.,* 413 F. Supp. at 425. In fact, we are unaware of any case that requires a Title VII employer to affirmatively dispel a negative public image *not* of its own making or else be subject to a finding of Title VII discrimination.

That said, the record extant and some of the district court's findings of fact can be read to support the alternate conclusion that Joe's management *intentionally* excluded women from food serving positions in order to provide its customers with an "Old World," fine-dining ambience. Thus, for example, the district court found that "Joe's management acquiesced in and gave silent approbation to the notion that male food servers were preferable to

female food servers." *Joe's Stone Crab,* 969 F. Supp. at 731. At another point in its findings, the district court observed that "Joe's sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu." *Id.* at 732-33. Moreover, the district court apparently also credited the testimony of one of Joe's former hiring maitre d', [sic] Roy Garrett, who explained that Joe's was "a male server type of job" by tradition. *Id.* at 732. As a result, the district court said that "women have systematically been excluded from the most lucrative entry level position, that of server." *Id.* at 740. Finally, the district court found that this historical practice of hiring only men was responsible for Joe's "male-only" reputation. The district court held that "Joe's reputation in the community, which reflected the restaurant's historical hiring practice, led potential female applicants not to apply for server positions. Joe's reputation, therefore, was largely responsible for the gender skew in the pool of applicants at the annual roll call." *Id.* at 736.

But, these factual findings do not mesh easily with a disparate impact theory because they suggest that Joe's hiring system was not in practice *facially-neutral,* but rather was *facially-discriminatory* on the basis of gender. They suggest the conclusion that in fact Joe's had a desired preference for male servers and that this preference influenced the hiring decisions of Joe's decisionmakers, resulting in the deliberate and systematic exclusion of women as food servers. If this were true, Joe's could be found liable for intentional discrimination in violation of Title VII. We emphasize that this is not a case like *Griggs,* where there was a pronounced history of intentional discrimination *followed* by a facially-neutral employment practice which perpetuates the effects of an employer's

previous discrimination. *See also Rowe v. General Motors Corp.*, 457 F.2d 348, 356 (5th Cir. 1972) (holding that GM's promotion/transfer standards "freeze" into effect the racial disparity in salaried jobs created by the company's prior policy of explicit discrimination); *Senter v. General Motors Corp.*, 532 F.2d 511, 526, 530 (6th Cir. 1976) (affirming the district court's finding that the employer's subjective promotions procedures had the effect of "locking" minorities into the hourly ranks and out of the supervisory ranks). The district court's findings and the record evidence indicate that Joe's hiring methodology and practices have remained relatively constant throughout the relevant time periods. Therefore, if Joe's was guilty of intentionally discriminating against women in hiring servers, it would be liable for intentional discrimination throughout the entire pre-charge period since there is absolutely no evidence that Joe's adopted new facially-neutral hiring requirements until, at best, the post-charge period when it implemented an objective tray test and started to use a three-person interview panel.

Having said all this, we reiterate that nothing in this record supports a disparate impact theory of liability. Rather, much of the district court's findings (as well as the credited record evidence), may be read to support the conclusion that Joe's employment practices in hiring servers were really permeated with an unlawful intention to discriminate. None of the district court's findings support the conclusion that a *facially-neutral* practice or policy of Joe's *caused* its reputation, and there is not a scintilla of evidence in the record to support this notion. In short, under the district court's findings, it is not the formal mechanics of Joe's roll-call system or the criteria embedded in its subjective hiring practices, nor its formal

delegation of hiring authority to its maitre d's which kept women from applying to and being hired by Joe's during the pre- and post-charge periods.

At bottom then, this case really centers around the theory that women refrained from making the "futile gesture," *Teamsters,* 431 U.S. at 365-366, 97 S.Ct., [sic] of applying to Joe's when they knew that Joe's only hired men as food servers. If Joe's reputation came from anything causally attributable to the restaurant, it emanated from Joe's own purportedly discriminatory hiring practices, *not* from the specific facially neutral practices identified by the district court. While we agree that in some situations evidence of prior historical discrimination may provide relevant background to a contemporary disparate impact challenge,[18] the facts of this case may be read to suggest something quite different; *i.e.* that Joe's hiring decisionmakers systematically excluded female applicants from consideration, that over time this male-only preference became common knowledge, and that eventually most potential, qualified, female applicants self-selected out of Joe's hiring process precisely because of its reputation for intentional sex discrimination. Indeed, the subsidiary factual findings in this case could be read in

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[18] For example in *Griggs* the Supreme Court made clear that Title VII prohibited an employer from using neutral hiring and promotion practices to "freeze" in place a status quo achieved through prior decades of intentional discrimination. *See Griggs,* 401 U.S. at 430, 91 S.Ct. at 853. In *Castaneda v. Pickard,* the former Fifth Circuit explained that it is appropriate to look beyond actual data to labor force data in order to establish disparate impact liability where the employer has used discriminatory recruiting practices which can "skew the ethnic composition of the applicant pool." *Id.,* 648 F.2d 989, 1003 (5th Cir. Unit A 1981).

simple syllogistic form: first, "Old World" fine-dining meant hiring only tuxedo-clad *male* servers; second, Joe's sought to emulate "Old World" fine-dining; and finally, Joe's therefore only hired male servers. If this is what the district court meant to find, it is indicative of something quite different from the theory of disparate impact. But we cannot affirm a disparate impact judgment where the case centers entirely around allegations and evidence of *intentional* discrimination. The record does not support it, and to do so would unwisely conflate the distinct theories of disparate impact and disparate treatment.

B. Remand

We are left then with two unattractive choices on appeal: first, we can affirm the liability judgment on an alternate theory of Title VII liability such as *disparate treatment* or *pattern or practice discrimination,* as the EEOC suggests, or we can remand so that the district court may reconsider its factual findings and conclusions of law. Although the district court's findings may be read to suggest a pattern or practice on the part of Joe's to intentionally discriminate on the basis of sex in its hiring of food servers, we are not prepared to draw this conclusion in the face of the district court's having expressly rejected this theory; rather we think a remand to the district court is the wiser choice.

We reach this conclusion for three principal reasons. First, we are deeply troubled by and unable to easily square the fundamental inconsistency between the district court's express rejection of the EEOC's intentional discrimination claim and several of its subsidiary factual findings that Joe's hired male servers only in order to

create an "Old World" fine dining ambience. At trial, the EEOC primarily argued an intentional discrimination theory of liability. However, as noted, the district court summarily rejected this theory without analysis. It unambiguously stated in the opening paragraph of its partial final judgment order that "[b]ased on an evaluation of the evidence, the court finds that the EEOC has not proved intentional discrimination." *Joe's Stone Crab,* 969 F. Supp. at 730. Later, in its conclusion of law section, the district court reiterated this conclusion observing that "[t]he court finds that the EEOC has not met its burden of proof under disparate treatment analysis." *Id.* at 735.

Second, after carefully reading the trial transcript, we believe the district court's conclusion that the EEOC has not met its burden of proving intentional discrimination may have been based on an erroneous view of Title VII case law. When "'a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the necessary findings.'" *Perryman v. Johnson Products Co., Inc.,* 698 F.2d 1138, 1144 n.11 (11th Cir. 1983) (quoting *Pullman-Standard v. Swint,* 456 U.S. 273, 291, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982)). In light of the district court's seemingly unambiguous findings that "Joe's has been a 'male server type' establishment for the better part of the century" and that "women have systematically been excluded from the most lucrative entry level position, that of server," *Joe's Stone Crab,* 969 F. Supp. at 740, we emphasize that a finding of disparate treatment requires no more than a finding that women were intentionally treated differently by Joe's because of or on account of their gender. To prove the discriminatory intent necessary for a

disparate treatment or pattern or practice claim, a plaintiff need not prove that a defendant harbored some special "animus" or "malice" towards the protected group to which she belongs.[19] In the race discrimination context, we recently have explained that "ill will, enmity, or hostility are not prerequisites of intentional discrimination." *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 n.7 (11th Cir. 1999). In *Ferrill*, for example, we held a defendant, who acted without racial animus but consciously and intentionally made job assignments based on racial stereotypes, liable for intentional discrimination. *See id.* The Supreme Court reached a similar conclusion in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987). In *Goodman*, union members sued their union under 42 U.S.C. § 1981 for intentionally failing to assert race discrimination claims against their employer. In its analysis, the Supreme Court explained that though "there was no suggestion [ ] that the [defendant] held any racial animus against or denigrated blacks generally," *id.* at 668, 107 S.Ct. at 2625, the union still could be held liable for racial discrimination " 'regardless of whether, as a subjective matter, its leaders were favorably disposed toward

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[19] Several ambiguous phrases in the district court's opinion suggest that the district court may have been operating under this erroneous view. For instance, in finding that Joe's did not have an express policy of excluding women from food server positions, the district court observed that the evidence only proved that "management acquiesced in and gave silent approbation to the notion that male food servers were preferable to female food servers." *Joe's Stone Crab*, 969 F. Supp. at 731. Of course, the district court's summary dispatch of the EEOC's intentional discrimination claims precludes us from knowing for certain whether it thought the EEOC had to prove that Joe's hiring policies emanated from some special "animus" or "malice" towards women.

minorities.'" *Goodman,* 482 U.S. at 669, 107 S.Ct. at 2625 (citing *Goodman v. Lukens Steel Co.,* 580 F. Supp. 1114, 1160 (E.D. Pa. 1984)). Based on this reasoning, we stated in *Ferrill,* "[t]he Goodman Court clearly held that liability for intentional discrimination under § 1981 requires only that decisions be premised on race, not that decisions be motivated by invidious hostility or animus." *Id.,* 168 F.3d at 473. While *Goodman* and *Ferrill* both involved § 1981 claims, there is no difference in the substantive doctrine of intentional discrimination under Title VII and § 1981.

Simply put, Title VII prohibits "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 708 n.13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (quoting *Sprogis v. United Air Lines Inc.,* 444 F.2d 1194, 1198 (7th Cir. 1971)), even where the stereotypes are benign or not grounded in group animus. Therefore, if Joe's deliberately and systematically excluded women from food server positions based on a sexual stereotype which simply associated "fine-dining ambience" with all-male food service, it then could be found liable under Title VII for intentional discrimination regardless of whether it also was motivated by ill-will or malice toward women.[20]

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[20] Perhaps the seminal case in this context is *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In *Price Waterhouse,* the district court found that the employer, an accounting firm, had discriminated against Ann Hopkins by permitting stereotypical attitudes about women (Hopkins had been found "too acerbic" in her tone for a woman) to play a role in its decision to deny her partnership in the firm. *See Hopkins v. Price Waterhouse,* 618 F. Supp. 1109, 1118-19 (D.D.C.1985). On appeal, the employer contended that it could not be liable for disparate treatment because "Hopkins did not prove

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Moreover, in light of the district court's findings that "Joe's management acquiesced in and gave silent approbation to the notion that male food servers were preferable to female food servers," *Joe's Stone Crab*, 969 F. Supp. at 731, and that "what prevailed at Joe's, albeit not mandated by written policy or verbal direction, was the ethos that

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'intentional' discrimination on the part of the [decision-making] Board, but only 'unconscious' sexual stereotyping by unidentified partners who participated in the selection process." *Hopkins v. Price Waterhouse*, 825 F.2d 458, 468 (D.C.Cir. 1987), *aff'g in part and rev'g in part, Hopkins*, 618 F. Supp. at 1113-21. This argument was squarely rejected by the court of appeals:

> In keeping with [Title VII's remedial] purpose, the Supreme Court has never applied the concept of intent so as to excuse an artificial, gender-based employment barrier simply because the employer involved did not harbor the requisite degree of ill-will towards the person in question. As the evidentiary framework established in McDonnell Douglas makes clear, the requirement [ ] of discriminatory motive in disparate treatment cases does not function as a 'state of mind' element, but as a method of ensuring that only those arbitrary or artificial employment barriers that are related to an employee or applicant's race, sex, religion, or national origin are eliminated.

Id. at 468-69 (footnotes omitted). This reasoning was affirmed on appeal by a plurality opinion of the Supreme Court. *Price Waterhouse*, 490 U.S. at 250-52, 109 S.Ct. 1775 (plurality opinion); *id.* at 259, 109 S.Ct. 1775 (White, J., concurring in the judgment); id. at 261, 272, 277-78, 109 S.Ct. 1775 (O'Connor, J., concurring in the judgment); *see also Hopkins v. Price Waterhouse*, 920 F.2d 967, 969 (D.C.Cir. 1990) (affirming district court decision after remand from Supreme Court and noting that this portion of *Hopkins*, 825 F.2d at 468-69, was upheld by the Supreme Court). Notably, the *Price Waterhouse* plurality explained that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted *on the basis of gender*," and therefore has committed intentional discrimination under Title VII. *Price Waterhouse*, 490 U.S. at 249, 109 S.Ct. 1775 (emphasis added).

female food servers were not to be hired," *Id.* at 732, we also emphasize that under our controlling case law, either under a disparate treatment or a pattern or practice theory, Plaintiff need not show that hiring decisions were made pursuant to an *express* policy or directive from Joe's owners. It is enough to show in a disparate treatment case that a particular employment decision was made because of sex and in a pattern or practice case that employment decisions were generally made deliberately because of sex, regardless of whether in either context a *formal* or *express* policy of discrimination existed from the employer. *See Teamsters,* 431 U.S. at 336, 97 S.Ct. 1843; *Harris v. Shelby County Bd. of Educ.,* 99 F.3d 1078, 1083 (11th Cir. 1996).

The third reason favoring remand is that almost all of the evidence of intentional discrimination came in the form of conflicting witness testimony subject to lengthy cross-examination. It is clear from the trial record, for example, that several plaintiff witnesses provided testimony, which if credited by the trial court, could support a finding of intentional discrimination. Several witnesses testified that Joe's management actively discouraged women from applying. Specifically, a former telephone clerk at Joe's, Cathy Evans, testified that she was told by General Manager Robert Moorehead, among others, to inform women who called about server positions that the restaurant did *not* hire female servers. In addition, former take-out cook Cassandra Williams testified that she was told by management that the restaurant only hired women to work in the take-out section, that she was told by a waiter that Joe's did not hire female servers, and that she overheard Roy Garret state that no women were hired to work in the main dining room. Finally, Barbara Mommsen testified that when she applied for a server position in

1987, she was told by owner Joanne Bass that Joe's did not hire female servers. It is equally clear from the trial record that Joe's owners and key management personnel, including Joanne Bass and Robert Moorehead, vigorously denied these specific allegations at trial. The district court made no specific findings on the credibility of these witnesses, and did not specifically resolve these credibility conflicts. We are not in a position on appellate review to sort through this conflicting witness testimony in regard to Plaintiff's intentional discrimination claims. Under our caselaw, we allot substantial deference to the factfinder, in this case, the district court, in reaching credibility determinations with respect to witness testimony. *See Stano,* 51 F.3d at 944 (holding that we defer even beyond clear error review to trial court findings relating to witness credibility determinations).

Since the state of this record is replete with conflicting witness testimony *and* conflicting conclusions drawn by the district court, the wisest approach, we think, is to remand the case to the factfinder for more detailed findings on the EEOC's intentional discrimination claims. Only in this way, can we be assured of reaching an outcome truly consonant with the factfinder's view of the evidence. We therefore abide by the general rule of law that "'a remand is the proper course unless the record permits only one resolution of the factual issue.'" *Cooper-Houston v. Southern Ry. Co.,* 37 F.3d 603, 604 (11th Cir. 1994) (quoting *Kelley v. Southern Pacific Co.,* 419 U.S. 318, 331-32, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974)); *see also DeMarco v. United States,* 415 U.S. 449, 450, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974) (stating that "factfinding is the basic responsibility of district courts, rather than appellate courts").

Finally, before we remand, we take a moment to explicate in more detail settled law concerning the requirements of Title VII liability based on a finding of intentional discrimination. There are two theories of intentional discrimination under Title VII: disparate treatment and pattern or practice discrimination. Disparate treatment claims require proof of discriminatory intent either through direct or circumstantial evidence. *See Harris,* 99 F.3d at 1083 (observing that a "'plaintiff must, by either direct or circumstantial evidence, demonstrate by a preponderance of the evidence that the employer had a discriminatory intent'" to prove a disparate treatment claim) (quoting *Batey v. Stone,* 24 F.3d 1330, 1334 (11th Cir. 1994)). "Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption." *Standard v. A.B.E.L. Servs., Inc.,* 161 F.3d 1318, 1330 (11th Cir. 1998) (citing *Carter v. City of Miami,* 870 F.2d 578, 580-81 (11th Cir. 1989)). Absent direct evidence, a plaintiff may prove intentional discrimination through the familiar *McDonnell Douglas* paradigm for circumstantial evidence claims. To establish a prima facie case of disparate treatment under this rubric, a plaintiff "must show: (1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated male employees more favorably; and (4) she was qualified to do the job." *Maniccia v. Brown,* 171 F.3d 1364, 1368 (11th Cir. 1999). Once these elements are established, a defendant has the burden of producing "legitimate, non-discriminatory reasons for its employment action." *Holifield v. Reno,* 115 F.3d 1555, 1564 (11th Cir. 1997) (citing *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). If such a reason is produced,

a plaintiff then has the ultimate burden of proving the reason to be a pretext for unlawful discrimination. *See Holifield,* 115 F.3d at 1565.[21]

In contrast, a pattern and practice claim either may be brought by the EEOC if there is "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice" of discrimination, 42 U.S.C. § 2000e-6(a) (1994); *see also In re Employment,* 198 F.3d at 1310 n.8, or by a class of private plaintiffs under 42 U.S.C. § 2000e, *et. seq., see Cox v. American Cast Iron Pipe Co.,* 784 F.2d 1546, 1549 (11th Cir. 1986). In such suits, the plaintiffs must establish "'that [sex] discrimination was the company's standard operating procedure.'" *Cox,* 784 F.2d at 1559 (quoting *Teamsters,* 431 U.S. at 336, 97 S.Ct. 1843); *see also Franks v. Bowman Transportation Co.,* 424 U.S. 747, 772, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). To meet this burden of proof, a plaintiff must "prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts. It ha[s] to establish by a preponderance of the evidence that [ ] discrimination [is] the company's standard operating procedure -- the regular rather than unusual practice." *Teamsters,* 431 U.S. at 336, 97 S.Ct. 1843 (footnote and internal quotation marks omitted). While "pattern or practice cases are a variant of the disparate treatment theory and thus '[p]roof of discriminatory motive is critical,'" statistical evidence often is

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[21] In *Reeves v. Sanderson Plumbing Products, Inc.,* --- U.S. ---, --- S.Ct. ---, --- L.Ed.2d ---, 2000 WL 743663 *9 (June 12, 2000), the Supreme Court explained that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."

used to establish the existence of a pattern or practice. *Lujan v. Franklin County Bd. of Educ.*, 766 F.2d 917, 929 (6th Cir. 1985) (quoting *Teamsters*, 431 U.S. at 335 n.15, 97 S.Ct. 1843). A plaintiff may establish a pattern or practice claim "through a combination of strong statistical evidence of disparate impact coupled with anecdotal evidence of the employer's intent to treat the protected class unequally." *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1051 (7th Cir. 1991) We also point out that "direct evidence of an intent to discriminate" may be used to establish a pattern or practice claim. *Lujan*, 766 F.2d at 929 n.15. Finally, we observe that in determining pattern or practice liability, the government is not required to prove that any particular employee was a victim of the pattern or practice; it need only establish a prima facie case that such a policy existed.[22]

Having offered these observations about Title VII law, we remand to the sound discretion of the district court, which has labored so long and diligently, so that it may make such factual findings and draw such conclusions of

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[22] Once this pattern or practice is established, the burden of proof then shifts to the employer to demonstrate that the government's showing of a pattern or practice of discrimination is either inaccurate or insignificant. If the employer fails to rebut the government's prima facie case, the resulting finding of a discriminatory pattern or practice may give rise to an inference that all persons subject to the policy were its victims and are entitled to appropriate remedies. As we have explained previously, "once a pattern and practice of discrimination is established, a rebuttable presumption that [the] plaintiff was discriminated against because of her sex and is entitled to recovery obtains. The employer may overcome this presumption only with clear and convincing evidence that job decisions made when the discriminatory policy was in force were not made in pursuit of that policy." *Cox*, 784 F.2d at 1559 (citing *Teamsters*, 431 U.S. at 362, 97 S.Ct. 1843).

law about the EEOC's intentional discrimination claims as it may deem appropriate. We have struggled mightily to avoid a remand. We know full well that much time and expense already has been spent on this case both before the district court and on appeal. However, in the end, we believe that the most just result is to remand to the district court for reconsideration in light of this opinion. In this way, the district court, which has heard all of the witness testimony firsthand, may conduct the relevant factfinding requisite for determining liability on the EEOC's intentional discrimination claims.[23]

III.

Accordingly, we vacate the district court's judgment of liability as to the EEOC's disparate impact claims, and we remand to the district court so that it may reconsider its factual findings and conclusions of law on the EEOC's intentional discrimination claims in light of this opinion. Because of our holding, we have no occasion to reach the various issues raised on appeal regarding the propriety of the remedies awarded by the district court.

VACATED AND REMANDED.

HULL, Circuit Judge, specially concurring in part and dissenting in part:

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[23] We stress that our remand in no way obligates the district court to hear additional evidence or argument in the case. Of course, the district court may choose to reopen trial proceedings for a limited purpose or conduct further evidentiary hearings if it feels such measures are necessary for the resolution of the case. We leave these procedural decisions to the sound discretion of the district court.

After a lengthy bench trial, the district court, as the fact-finder, entered comprehensive findings of fact and conclusions of law. *EEOC v. Joe's Stone Crab, Inc.*, 969 F. Supp. 727, 730-35 (S.D. Fla. 1997). The trial evidence amply supports all of the district court's factual findings, and the majority does not contend otherwise. Thus, I concur in the majority opinion to this extent.

I also agree with the majority that disparate *impact* liability requires a showing that facially-neutral employment practices caused the lack of female food servers at Joe's. I disagree, however, with the majority's conclusion that the district court "identified no *facially-neutral* practice responsible for the gender disparity in Joe's food server population and we can find none." I disagree because the district court (1) did single out certain employment practices that are facially-neutral and (2) did not err in finding that these practices *caused* the gender disparity in Joe's food servers. In my view, the district court's finding of disparate *impact* liability should be affirmed in full.

Alternatively, even if, as the majority concludes, the district court's subsidiary factual findings suggest that *facially-discriminatory* practices at Joe's actually caused the gender disparity and thus its findings support only disparate *treatment* liability, we should affirm on that alternate ground. A remand for more work by this trial court is unnecessary. To demonstrate why the liability phase of this protracted case should end here, I discuss first why the district court did not err in finding disparate *impact* liability, and then why the district court's subsidiary findings are amply sufficient for us to affirm the district court's liability decision on the alternate ground of disparate *treatment*.

I. DISPARATE IMPACT LIABILITY

It is undisputed that from 1950 to 1986, Joe's hired all male food servers with one exception. The district court identified facially-neutral employment practices by Joe's that caused this historical gender disparity in its food servers to continue in the pre-charge period – from 1986 to 1990 – and the post-charge period – from 1991 to 1995. The district court even began its conclusions of law by acknowledging that "[t]o establish a prima facie case of disparate *impact* sex discrimination, the plaintiff must show that a *facially neutral* practice of the employer has a disproportionate impact on one sex." *Id.* at 735 (emphasis added).[1] The district court then correctly stated that, to prove a disparate *impact* claim, the EEOC: (1) must show a legally significant statistical "disparity between the proportion of women in the available labor pool and the proportion of women hired"; (2) must "identify the specific employment practice alleged to cause such disparity"; and (3) must "show the causal nexus between that employment practice and the disparity." *Joe's Stone Crab*, 969 F. Supp. at 735.[2]

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[1] The district court also properly pointed out that "[t]he premise of disparate impact theory is that some employment practices, adopted without a deliberately discriminatory motive, may be the functional equivalent of intentional discrimination. . . . Accordingly, discriminatory intent is not the focus under this model." *Id.* at 735 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988), and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

[2] After finding that the EEOC established a prima facie case, the district court correctly determined (a) that the burden of production shifts to the defendant Joe's to show that the challenged employment practices serve a legitimate, non-discriminatory business objective, and (b) that even if Joe's satisfies this burden, the EEOC may still prevail

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The district court also correctly applied these legal principles to its factual findings. The majority opinion only assumes that the district court properly found that the EEOC demonstrated that the required gender disparity between the available labor pool and Joe's actual hires. In my view, however, the EEOC clearly proved that the available qualified labor pool of food servers was 31.9% women.[3] *Joe's Stone Crab,* 969 F. Supp. at 737. Thus, the

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by establishing that an alternative, non-discriminatory practice would have served the defendant's stated objective equally as well. *Id.* at 735-36. The district court ultimately held that even if Joe's hiring process serves a legitimate business objective, alternative non-discriminatory practices would have served these objectives equally as well. *Id.* at 740-41. Because the parties' and majority's main focus in this appeal is the sufficiency of the EEOC's prima facie case, I do not discuss why the district court correctly found that "the EEOC's prima facie case stands unrebutted." *Id.* at 741.

[3] We review the factual determination of the available qualified labor pool for clear error. *See Kilgo v. Bowman Transp., Inc.,* 789 F.2d 859, 869 (11th Cir. 1986) (holding that "the district court's rejection of Bowman's applicant flow data is not clearly erroneous"). This Court has emphasized that the Supreme Court "has rejected the requirement that a prima facie case of disparate impact must be based on an analysis of the characteristics of actual applicants." *Kilgo,* 789 F.2d at 868 (citing *Dothard v. Rawlinson,* 433 U.S. 321, 330 (1977)); *see Hazelwood Sch. Dist. v. United States,* 433 U.S. 299, 308 n.13 (1977); *Forehand v. Florida State Hosp.,* 89 F.3d 1562, 1574 (11th Cir. 1996). This Court also has reaffirmed that different types of labor statistics are relevant to determine the available labor pool and that actual-applicant data may not adequately reflect the potential labor pool. *See In re Employment Discrimination Litig. Against the State of Ala.,* 198 F.3d 1305, 1313 (11th Cir. 1999) (stating "even actual applicant statistics may 'not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.' *Dothard,* 433 U.S. at 330, 97 S.Ct. at 2727; *see also Wards Cove,* 490 U.S. at 651 n.7, 109 S.Ct. at 2122 n.7; *Kilgo,* 789 F.2d at 868."). And the Supreme Court has emphasized that the proper

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proven statistical disparity – between 31.9% and 0% in the pre-charge period and 31.9% and 21.7% in the post-charge period – is legally significant.[4]

Because the evidence overwhelmingly showed a legally significant gender disparity in Joe's food servers, the majority opinion necessarily focuses on the second and third prongs of a prima facie disparate impact case – whether the EEOC and the district court identified *facially-neutral* employment practices as *causing* this

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approach is to focus on the qualified population in the relevant labor market. *See Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650-51 (1989).

Further, the district court did not err in finding the available qualified labor pool was 31.9% women, and not the 0 to 3% or 21.9% *actual* applicants as claimed by Joe's. The district court's findings were amply supported by evidence (a) that 30 to 40% of the food servers at nearby Miami restaurants were female, (b) that the 1990 census data showed the available qualified labor pool of servers being 44.1% women, and (c) the testimony of Dr. McClave, Joe's own expert, who had refined this 44.1% to 31.9% to reflect only *experienced* food servers in the *higher* income brackets of Joe's food servers. *See Kilgo,* at 869-70 (concluding that the "determination of the relevant labor market in [that case was] essentially a factual inquiry"); *Markey v. Tenneco Oil Co.*, 523 F.2d 497, 499 (5th Cir. 1981) (stating that the trial court is afforded a great deal of discretion in determining the relevant labor market). Finally, the waiter or server work force in Dade County, Florida, was 69.6% female. Thus, this 31.9% figure was substantially less and a conservative percentage given the overall evidence.

[4] The statistical disparity between 0% and 31.9% is stark. And, even when this 31.9% figure is compared to the 21.7% hiring statistics in the post-charge period, the "standard deviation" is between 1.96 and 2.07, which is a legally significant disparity under the case law. *See Watson,* 487 U.S. at 995 n.3, 108 S. Ct. 2777; *Maddox v. Claytor,* 764 F.2d 1539 (11th Cir. 1985); *James v. Stockham Valves & Fittings Co.,* 559 F.2d 310, 325 n.18 (5th Cir. 1977); *Rowe v. General Motors Corp.,* 457 F.2d 348, 349 (5th Cir. 1972).

gender disparity. The majority concludes they did not. I conclude they did.

The main facially-neutral employment practice identified by the district court was management's lack of *any* hiring guidelines and policies and the resultant "undirected and undisciplined delegation of hiring authority to subordinate staff."[5] *Joe's Stone Crab,* 969 F. Supp. at 738. Within the ambit of "undirected and undisciplined delegation of hiring authority to subordinate staff," the district court included these facially-neutral practices: (1) management's lack of any written or even oral guidelines for its staff to follow in hiring; (2) the staff's use of mainly a subjective interview process and "subjective intuition" for hiring its servers; (3) management's sitting in on the roll call process but providing no input; and (4) lack of any managerial oversight and lack of any standardization, as exemplified by management's failure to raise a question when the subordinate staff filled 108 consecutive vacancies with only male servers. *Id.* at 738-39. The majority states that "the subjective hiring criteria did not harm women once they entered the application process." I disagree because the record evidence supports the district court's findings that it did. Many qualified women

[5] Joe's did not have any objective guidelines for hiring food servers but utilized only subjective hiring practices. Thus, the EEOC claimed that Joe's subjective hiring practices had a disparate impact on women. The Supreme Court has expressly held that disparate impact analysis may be applied to subjective hiring practices. *See Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 648, 109 S. Ct. 2115, 2120 (1989) (citing *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 108 S. Ct. 2777, 101 L.Ed.2d 827 (1988)). The Supreme Court has stated that the delegation of hiring decisions can constitute an employment practice under disparate impact theory. *See Watson,* 487 U.S. at 990-92.

attended Joe's roll calls and were interviewed, but were not hired.[6]

The district court emphasized that the subjective criteria that Joe's hiring staff used, and the majority focuses on, – appearance, attitude, articulation, and experience – were not defined in any way or standardized between interviewers. *Id.* at 738. For example, the district court found that the criteria of experience was not defined by management and varied among staff interviewers based upon their subjective beliefs about what constituted experience. The district court also found that some of Joe's hiring staff believed that prior single service experience –

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[6] For example, Catherine Stratford testified that she moved from New Jersey to Miami Beach to attend Joe's "roll call" in 1990. After her move, she did not apply because her roommate told her that Joe's did not hire female servers. In 1991, Ms. Stratford applied at Joe's but was not hired. Teresa Romanello testified that she was dissuaded from applying in 1987 by Joe's reputation for hiring only male servers. In 1993, however, Romanello applied unsuccessfully. Carol Coyle also testified that she heard that Joe's did not hire women. After the EEOC charge, Coyle attended the roll call in 1991 but was not hired. Racquel Munoz testified that she would have applied for a server position in 1989 but did not because of Joe's reputation for not hiring women. After the EEOC charge, Munoz applied unsuccessfully in 1991. In addition, Barbara Mommsen testified that "it was common knowledge that they [Joe's] didn't hire women at the time" and that "Joe's had a reputation of being one of the best restaurant jobs to get if you were a man. As far as being a woman, you need not apply."

The above testimony is from the liability trial. At the subsequent damages trial, these witnesses also testified about Joe's 1997 roll call. For example, Stratford applied unsuccessfully in 1997. Romanello went to the first day of the 1997 roll call but left. Thereafter, she went back, was interviewed, but was not hired. The district court entered a damages order on August 12, 1998, and awarded back pay to Stratford from 1990-95, to Coyle from 1991-95, to Romanello from 1989-96, and to Munoz from 1989-96.

as opposed to team service experience – is required; others did not. As a result, the district court found that some female candidates with decades of experience were rejected by Joe's staff, while other males without any experience were hired. *Id.* at 739.[7] Likewise, the district court found that Joe's hiring staff differed as to what restaurants are "similar" to Joe's for purposes of experience. *Id.*

The district court also observed that after the EEOC's charge, Joe's management directed the daytime Maitre d' to interview with another Maitre d' and subsequently used a panel of three interviewers, later changed to include a woman. The district court found, however, that "[w]hile management's introduction of a panel system for interviewing may dilute the subjective views of any one evaluator, it does not overcome management's failure to develop uniform, gender-neutral guidelines to ensure that all interviewers interpret criteria in the same manner and apply them consistently." *Id.* The district court summarized Joe's hiring decisions as being left to each interviewer's "own subjective intuition" and the interviewers' judgment being "informed largely by their own experience in the restaurant's atmosphere of all-male service." *Id.* at 738.

Another major employment practice at Joe's, which the district court identified as causing the gender disparity, was Joe's use of only a "word-of-mouth" roll call system

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[7] As an example, Barbara Fitzpatrick, an applicant with twenty years of serving experience, was not thought to merit invitation to even the probationary training period, while a male applicant without any prior experience was hired and cited by Joe's Maitre d's, Roy Garret and Raymond Damiano, as being a "one in a million" server.

for recruiting new servers. The district court pointed out that year after year only a few women came to the roll call due to Joe's well-known historical practice of hiring, and using, only tuxedo-clad men as servers. The district court emphasized that Joe's did not advertise in the newspaper or elsewhere that it was an equal opportunity employer or that Joe's hired both men and women as servers. Instead, Joe's continued recruiting through only the "word-of-mouth" roll call on the first Tuesday in October – just as it had done for decades.

The majority stresses that the particular date of the roll call was widely known in the Miami Beach community, and that no woman testified that she failed to apply because she was unaware of the roll call. However, the district court found that Joe's historical practice of hiring only men as servers was also well known in that community and caused women servers to self-select out and not come to Joe's roll call. Joe's *own conduct* caused the dearth of women applicants. The district court, in effect, found women refrained from making the futile gesture of attending the roll call when they knew Joe's hired only men as servers.

Although the undisciplined delegation of hiring, subjective interview process, and the use of a roll call are facially-neutral employment practices, the district court also referenced "Joe's history of being an all-male server establishment." *Id.* at 739. Excluding women as servers – even if to create a fine dining ambience of tuxedo-clad men – is a facially-discriminatory practice, as the majority notes. However, Joe's past discriminatory hiring is part of the factual background against which the district court analyzed whether the above facially-neutral practices caused the gender disparity to continue. The district

court's order raised the precise question of whether "Joe's undirected and undisciplined delegation of hiring authority cause[d] the disparity between the number of women hired as servers and the number of women available, or are forces outside the hiring process --- such as a deteriorating neighborhood, low turnover, or the heavy lifting required of servers --- to blame?" *Id.*[8]

In short, the district court considered the above facially-neutral employment practices, not in a vacuum, but in the context of Joe's historical discriminatory practice of excluding women as food servers. The district court properly considered Joe's historical discriminatory practices, and the "males-only" reputation Joe's created for itself, as relevant background evidence in examining whether Joe's facially-neutral employment practices *caused and continued* the gender disparity in Joe's food servers. In doing so, the district court did not err because it is well settled that past discrimination is admissible to

[8] Joe's contends that the fact that during the 1980s, South Beach Miami was a high-crime area explains the low pre-charge applicant numbers. In addition, Joe's asserts that the area began to be revitalized at almost the same time as the EEOC commenced its investigation, thus accounting for the increase in female applicants during the post-charge period. Joe's also presented evidence that its server's job involves carrying extremely heavy trays and a "frantic" pace. Joe's evidence was countered at trial, however, by the facts (1) that many of Joe's other staff members were female, (2) that there was security at Joe's, and (3) that Southpointe Seafood, directly across the street, had a wait staff that was 25% female. Further, the increase in female applicants at Joe's after 1991 did not correspond to any change in the strenuous nature of the server position.

demonstrate that facially-neutral employment practices continue to perpetuate the effects of past discrimination.[9]

Against this historical backdrop, then, the district court found that management's continued unguided and undisciplined delegation of hiring authority, without any written or verbal policies or guidelines, allowed Joe's subordinate staff (a) to recruit servers by using only its "word-of-mouth" roll call system even though that system had proved to recruit mostly male applicants, and (b) to continue to hire all males as food servers based on their "gut feelings" regardless of the qualified women who did apply. In this manner, the facially-neutral practices caused the gender disparity. The district court further described how Joe's delegation of hiring authority to staff without any guidelines, and the use of solely the "word-of-mouth" roll call, actually caused the statistical disparity, as follows:

> When subordinate staff filled 108 sequential vacancies with male servers, management never raised a question nor voiced an objection. This

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[9] *See Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 540 n.25 (5th Cir. 1980) (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), for the proposition that discriminatory acts not made the basis of a timely charge or occurring before the statute was passed may be considered as background evidence regarding a current practice); *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1383 (5th Cir. 1980) (stating that evidence of pre-Act discrimination is admissible to prove that facially neutral practices have acted to perpetuate the effects of that past discrimination); *see also Walker v. Jefferson County Home*, 726 F.2d 1554, 1557 (11th Cir. 1984) ("In a disparate impact case, the court clearly may consider evidence of prior discriminatory acts if such evidence is relevant to show independently actionable conduct occurring within the statutory period.").

> silence signified approbation. Jo Ann Bass confirmed the absolute nature of this delegation when she testified: "I have nothing to do with hiring or firing. I give an overall view as to something that I see as glaring." Although she always sits in on the annual roll call, Mrs. Bass has never instructed the hiring staff how to select servers and does not set out guiding principles. Thus, the subordinates are left to make decisions according to their own subjective intuition. Moreover, their judgment of what is appropriate is informed largely by their own experience in the restaurant's atmosphere of all-male service.

Id. at 738.

Additionally, the district court correctly found that Joe's facially-neutral recruiting and hiring practices did not address the entrenched "male-only" hiring and "male-only" reputation Joe's created for itself and thereby further caused the gender disparity to continue. The district court found that, at a minimum, Joe's needed to advertise that it now hired both men and women as servers. Instead, Joe's continued reliance on the facially-neutral, "word-of-mouth" roll call caused the gender disparity in its applicant pool and, in turn, its hires, to continue. Furthermore, as to the women who did apply, the district court found that "without additional guidance and structuring by management, there is no assurance that female applicants who [do] attend roll call will be treated even-handedly." *Id.* at 740.

The district court's findings are akin to those in *Griggs* and other cases in which neutral employment practices have been found to perpetuate historical discrimination. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (making clear that Title VII prohibited an

employer from using neutral hiring and promotion practices to "freeze" in place a status quo achieved through prior decades of intentional discrimination); *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).[10] In situations where a protected group has been historically and systematically frozen out of certain employment positions, a purely subjective recruiting and hiring system can act to perpetuate that problem.

As in *Rowe,* Joe's had a historical practice of excluding a protected group. Nor was any direction given to Joe's hiring staff or potential applicants that an effort was being made to change its longstanding historical practice of excluding women as food servers. Indeed, just the opposite occurred. Joe's hired 108 male servers between 1986 and 1990 but no women, without management voicing an objection to its staff. Further, the hiring staff continued to

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[10] In *Rowe,* a group of black employees challenged the promotion and transfer procedures at an Atlanta General Motors plant on the ground that they had a disparate impact upon blacks. These procedures depended almost entirely upon a favorable recommendation from an employee's immediate foreman. In making these recommendations, the foremen at the plant were given no written instructions as to qualifications to look for in making promotion decisions, and those qualities that were typically used were vague and subjective. Further, there was no system for informing hourly employees, who were largely black, of promotion opportunities or the qualifications necessary to obtain these promotions. Finally, the evidence in *Rowe* showed that the plant had a long history of pre-act discrimination and that there was a significant statistical disparity between the number of blacks promoted or transferred through the above system and the number of whites. Because the process described above provided no protection from the expressions of prejudice by the foremen upon whose recommendations employees relied for promotion, the court found that the promotion process had a disparate impact upon blacks. *Id.* at 358-59.

use only the "word-of-mouth" roll call for recruiting without objection, and was given little to no guidance in terms of how to assess even those female applicants who did apply. As a result, Joe's staff admittedly relied upon vague "gut feelings." The staff themselves testified that they viewed Joe's as a place for male servers.[11] Without guidance from their superiors, this stereotype undoubtedly guided their "gut" feelings as to whom to hire.

Because Joe's delegated authority over both recruiting and hiring to staff who admittedly felt that the restaurant was a male-server type of establishment and had historically known it to be so, Joe's staff was content to hire only men and to use a "word-of-mouth" roll call system which recruited mostly men. Further, the interviewers admitted bias for male servers went unchecked by guidance from management.[12] Given the historical context, the district court did not err in finding that management's continued lack of any guidance to its hiring staff, the staff's continued use of only the "word-of-mouth" roll call, and the use

[11] Maitre d' Garrett testified that Joe's always had qualified women but hired male food servers because it was traditionally a male-server establishment. Similarly, Anthony Arneson, the Maitre d' in charge of hiring beginning in 1987, testified that gender was never mentioned by Joe's managers or employees because of a "perception that people didn't even think about" – "that many fine dining establishments throughout the world have an all male staff."

[12] *See Maddox v. Claytor*, 754 F.2d 1539, 1549 (5th Cir. 1985) (noting that it is possible for employers to implement guidelines for interviewing officials that would render a subjective interviewing process "a much less practicable mechanism for discrimination" without limiting the officials' authority).

of a subjective interview process caused the gender disparity to continue in both the attendance at the roll call, from which Joe's hired exclusively, and in the actual hires.

Thus, I conclude that the district court's findings – that Joe's specific *facially-neutral* recruiting and hiring practices *caused* the gender disparity in its serving staff – are not clearly erroneous.[13]

II. DISPARATE TREATMENT

Alternatively, even if, as the majority concludes, the district court's subsidiary factual findings that Joe's systematically excluded women as food servers show that disparate *treatment* analysis is more appropriate in this case than disparate *impact* analysis, I would affirm the district court's liability finding on that basis.

The majority concedes that "some of the district court's findings of fact can be read to support the alternate conclusion that Joe's management *intentionally* excluded women from food-serving positions in order to provide its customers with an 'Old World,' fine-dining ambience." I would go further and hold that the district court's factual

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[13] Further, because the EEOC has proven that the specific hiring practices of Joe's caused the dearth of women servers, the district court's finding does not, as Joe's argues, require the restaurant to hire in accordance with population percentages or implement quotas. Rather, it merely requires Joe's to prevent the perpetuation of hiring practices that have an adverse impact upon women. *See Craig v. Alabama State Univ.*, 804 F.2d 682, 688 (11th Cir. 1986) (noting that in light of prior discriminatory practices, "the university had an obligation under *Griggs* to not utilize selection criteria that maintain the status quo of its racially imbalanced workforce").

findings actually do support disparate *treatment* liability. Specifically, the district court found that Joe's was "traditionally a male place" and was "always a tradition . . . that it was a male server type of job," quoting Maitre d' Garret's testimony to this effect:

> As I said before, we had very few female applicants over the years. It was sort of a tradition. . . . *It was always tradition* from the time I arrived there *that it was a male server type* of job. And until just recently when we became aware that we had to do other things, . . . originally *it was traditionally a male place. We always had women that were qualified women.* . . . Traditionally, I mean, it's just some restaurants, when you walk in, you know there are going to be women waitresses, other restaurants you know it is going to be male waiters.

Joe's Stone Crab, 969 F. Supp. at 732 (alteration by district court) (emphasis added).[14] The district court also found

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[14] In addition to Maitre d' Garret's admission, Maitre d' Arneson, who was in charge of hiring beginning in 1987, testified that gender was never mentioned by Joe's managers or employees because of a "perception that people didn't even think about" – "that many fine dining establishments throughout the world have an all male staff."

The district court also quoted the testimony of owner Grace Weiss who explained that she "cannot explain the predominance of male servers but perhaps it had to do with the very heavy trays to be carried, *the ambience of the restaurant* and the extremely low turnover in servers." *Id.* at 732. The district court rejected Joe's "heavy tray" and "low turnover" explanations, and found that the true reason Joe's had only male servers was it excluded women to create a fine-dining ambience with tuxedo-clad male servers. *Id.* The district court found the evidence established that "women have the physical strength to carry serving trays" and that Joe's own witnesses, including Maitre d' Arneson and Captain Sutton, had "attested to the fact that women are

(Continued on following page)

that Joe's excluded women as servers because "Joe's sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu." *Id.* at 733.[15]

At another point, the district court found that "Joe's management acquiesced in and gave silent approbation to the notion that male food servers were preferable to female food servers." *Id.* at 731. The district court further found that "what prevailed at Joe's, albeit not mandated by written policy or verbal direction, was the ethos that

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capable of performing every aspect of a food server's job at Joe's." *Id.* The district court also found the "low turnover" rate did not explain the absence of women food servers. *Id.* Even with Joe's "low turnover," there were still 108 new food servers hired between 1986 and 1990, but none was female.

[15] The court's order quoted expert Karen McNeill's testimony in this regard:

> It has been an attitude and standard, it comes from Europe. In all of Europe you will find in all of the grade three restaurants in Europe, there is an impression that service at the high level is the environment of men, and that it ought to be that way. And I think that that attitude a few decades ago came and was felt a little bit here in this country.
>
> . . .
>
> Those [European] opinions and those sensibilities, I think were in fact carried here by restauranteurs who hoped to create something serious. If you wanted to create a serious restaurant that would become known in the community, that would become one of the community's great restaurants, you did what they did in Europe, you modeled yourself after them. I don't think anybody thought about it. They said, well, men did it there. It tended to be men here, too, who had those skill sets, and so men were [sic] automatically became the labor pool.

Id. (alterations by the district court).

female food servers were not to be hired." *Id.* at 732. Later in its factual findings, the district court twice repeated its description of Joe's hiring as "Joe's historical practice of not hiring [women]." *Id.* at 733, 734. In its conclusions of law, the court similarly repeated its factual finding that historically Joe's was a male-server establishment and systematically excluded women from the server position, as follows:

> As the court detailed in its findings of fact, Joe's has been a *"male server type" establishment* for the better part of this century. While women have predominated among Joe's owner/managers, as well as among the laundry, cashiering, and take away staff, *women have systematically been excluded from the most lucrative entry level position, that of server.*

Id. at 740 (emphasis added).

At trial, Joe's asserted that it had no women servers because it "hired from an open applicant pool and women simply did not apply." *Id.* at 733. The district court expressly rejected Joe's contention. Instead, the district court found that Joe's hired only males as servers for half a century because it wanted to emulate the "Old World" tradition of male servers to create an ambience of "fine dining." The court also specifically found that Joe's all-male serving staff and its historical hiring practices caused its "male-only" reputation, stating:

> [T]he court finds that Joe's historical practice of not hiring women as food servers resulted in the commensurate reputation. This reputation caused many eligible female food servers not to attend the annual roll call, considering it a waste of time. This is a significant finding, for Joe's

> argued at trial that it did not discriminate against women because it hired from an open applicant pool and women simply did not apply. The EEOC agreed that women rarely attended roll calls, but contended this was due to Joe's historical practice and resulting reputation for not hiring female food servers. The court concludes that the EEOC's analysis is correct.[16]

Id. at 733.

In summary, the district court expressly found that Joe's systematically excluded women as food servers, and that Joe's longstanding practice of excluding women as servers created its well known "male-only" reputation. Thus, Joe's "male-only" hiring practices and "male-only" reputation caused the dearth of female applicants at its roll call and the lack of female food servers. As the majority opinion acknowledges, "much of the district court's findings (as well as the credited record evidence), may be read to support the conclusion that Joe's employment practices in hiring servers were really permeated with an unlawful intention to discriminate."

Thus, as the majority opinion appears to concede, the district court's subsidiary factual findings are sufficient to support disparate treatment liability. As the majority

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[16] The majority questions the district court's use of reputation evidence, but ultimately acknowledges that "a company may be held liable for a discriminatory reputation if there is evidence it caused or perpetuated that reputation through some *intentional* affirmative act, *see Morrow*, 491 F.2d at 1055-57; *Rath Packing*, 787 F.2d at 337." Even assuming this is correct, there was extensive evidence presented at trial that Joe's discriminatory hiring conduct created its "male-only" reputation.

states, "a finding of disparate treatment requires no more than a finding that women were intentionally treated differently by Joe's because of or on account of their gender." Furthermore, as the majority states, "[t]o prove the discriminatory intent necessary for a disparate treatment . . . claim, a plaintiff need not prove that a defendant harbored some special 'animus' or 'malice' towards the protected group to which she belongs." Rather, as the majority observes, "[i]f Joe's deliberately and systematically excluded women from food server positions based on a sexual stereotype which simply associated 'fine-dining ambience' with all-male food service, it then could be found liable under Title VII for intentional discrimination regardless of whether it also was motivated by ill-will or malice toward women."

The majority does not go a step further and affirm on the alternate ground of disparate treatment, however, because it is troubled by "an inconsistency" in the district court's order. As the majority opinion points out, the district court never discusses or analyzes the EEOC's disparate treatment claim, but instead gives only the summary legal conclusion that "the EEOC has not proved intentional discrimination" and "has not met its burden of proof under disparate treatment analysis." *Joe's Stone Crab*, 969 F. Supp. at 730, 735. Despite the lack of analysis or discussion, the majority opinion finds that this two sentence summary legal conclusion creates a "fundamental inconsistency" with the district court's factual findings, making remand the "wiser choice."

I would agree were it not for the fact that the district court made such extensive and clear factual findings about Joe's discriminatory hiring practices. The record evidence overwhelmingly supports those factual findings, and those

factual findings clearly support disparate treatment liability. More importantly, any inconsistency created by this two-sentence legal conclusion is easily reconciled from the face of the district court's order itself. A close analysis of the order reveals that the district court was under the mistaken view that the intentional discrimination necessary for disparate treatment required either (1) an express policy or directive from Joe's owners to exclude women or (2) some animus, ill-will, or malice toward women.

The district court viewed Joe's discriminatory practice as one adopted by Joe's as the by-product of its "fine dining" tradition and therefore not a direct intentional act of discrimination against women. Specifically, in the district court's view, the hiring of men was due to a desire to emulate a "fine dining" tradition, as opposed to an animus toward, or a written policy excluding, women. As a result, the district court viewed Joe's practices as causing a disparate impact on women rather than intentional discrimination against women. *Id.* at 731.

But as the majority aptly states, if Joe's "excluded women from food server positions based on a sexual stereotype which simply associated 'fine dining' ambience with only all-male food service, it then could be found liable under Title VII for intentional discrimination regardless of whether it had such a written policy or was motivated by ill-will or malice." Since the district court so clearly made repeated findings that this is precisely what occurred at Joe's, I would affirm on the alternative ground of disparate treatment thus pretermitting any need for remand. As the majority points out, this district court "has labored . . . long and diligently" and this "remand in no way obligates the district court to hear additional evidence or argument in the case." Because the majority "remand[s]

to the sound discretion of the district court," that court may consider whether to simply strike the two sentences the majority finds create a "fundamental inconsistency" and to then reaffirm its decision on the alternate ground that the EEOC proved disparate treatment of women food servers at Joe's.

Lastly, the majority opinion favors remand because "almost all of the evidence of intentional discrimination came in the form of conflicting witness testimony subject to lengthy cross-examination." The majority notes that witnesses Evans, Williams, and Mommsen testified that Joe's management told them that Joe's did not hire female servers and actively discouraged women from applying, but also notes that Joe's management witnesses Bass and Moorehead denied doing this. The majority observes that the district court "made no specific findings on the credibility of these witnesses, and did not specifically resolve these credibility conflicts," and concludes that "we are not in a position on appellate review to sort through this conflicting witness testimony in regard to plaintiff's intentional discrimination claims."

I disagree. This analysis ignores that the district court did make clear and extensive factual findings that Joe's excluded women as food servers in order to emulate an Old World fine dining experience and then cited certain evidence and quoted at length certain admissions in the testimony by Joe's management witnesses that amply supported those factual findings. The district court was not required in its order to review and make credibility findings regarding each part of the testimony of each witness. Nor is the district court required to detail all of the other extensive trial evidence that supported its factual findings regarding why Joe's had all male servers.

Instead, our job on appeal is to review the entire record evidence in the light most favorable to the EEOC, as we must, and to determine whether that evidence amply supports the extensive factual findings the district court did make. The record evidence clearly does. The findings that the district court actually did make are more than sufficient to support liability on the alternative ground of disparate treatment. Thus, it is unnecessary to remand this case for the district court to resolve further credibility conflicts.

For all of these reasons, I would affirm the district court's liability decision in this case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-5367-HH

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

versus

JOE'S STONE CRABS, INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Nov. 14, 2000)

BEFORE: BLACK, HULL and MARCUS, Circuit Judges

PER CURIAM:

The petition(s) for rehearing filed by Joe's Stone Crab, Inc. is DENIED.

ENTERED FOR THE COURT:

/s/ Stanly Marcus
UNITED STATES CIRCUIT COURT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

JOE'S STONE CRAB, INC.,

Defendant. /

CASE NO.:
93-1082-CIV-HURLEY

ORDER ESTABLISHING
PREJUDGMENT INTEREST

(Filed Aug. 31, 1998)

THIS CAUSE is before the court following a hearing on the question of prejudgment interest. After receiving testimony and having the benefit of argument by counsel, the court announced its ruling on how prejudgment interest is to be calculated in this case. The court's ruling and the reasons set forth in the record are incorporated by reference in this order. Applying the court's methodology, the parties have stipulated that the appropriate calculations are as follows:

Catherine Stratford	$25,977.48
Raquel Munoz	$14,213.54
Carol Coyle	$ 6,570.46
Teresa Romunello	$10,837.49

Accordingly, the clerk is **ORDERED** to prepare and enter a final judgment for the claimants consistent with this court's memorandum opinion on damages and this order on prejudgment interest.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida, this 29th day of August, 1998

/s/ Daniel K. Hurley
Daniel T.K. Hurley
U. S. District Judge

Copies provided to:
Gedety Serralta, Esq.
Robert D. Soloff, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

JOE'S STONE CRAB, INC.,

Defendant.

CASE NO.:
93-1082-CIV-HURLEY

FINAL JUDGMENT ON DAMAGES

(Filed Aug. 31, 1998)

Based upon orders of the court specifying damages and prejudgment interest, pursuant to Federal Rule of Civil Procedure 58 final judgment is entered as follows:

1) Claimant Catherine Stratford shall take and recover judgment from defendant, Joe's Stone Crab, Inc., in the amount of $71,149 for damages and $25,977.48 for prejudgment interest, for a total of $97,126.48. For which, let execution issue.

2) Claimant Raquel Munoz shall take and recover judgment from defendant, Joe's Stone Crab, Inc., in the amount of $35,230 for damages and $14,213.54 for prejudgment interest, for a total of $49,443.54 . For which, let execution issue.

3) Claimant Carol Coyle shall take and recover judgment from defendant, Joe's Stone Crab, Inc., in the amount of $15,313 for damages and $6,570.46 for prejudgment interest, for a total of $21,883.46. For which, let execution issue.

4) Claimant Teresa Romanello shall take and recover judgment from defendant, Joe's Stone Crab, Inc., in the amount of $32,513 for damages and $10,837.49 for prejudgment interest, for a total of $43,350.49. For which, let execution issue.

The Court reserves jurisdiction to enter judgment for costs.

ENTERED at West Palm Beach, Florida, this 31st day of August, 1998.

Carlos Juenke
Clerk of Court

By: /s/ James Caldwell
James Caldwell,
Deputy Clerk

Copies furnished to:
Gedety Serralta, Esq.
Robert D. Soloff, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

JOE'S STONE CRAB, INC.,

Defendant. /

CASE NO.: 93-1082-CIV-HURLEY

AMENDED
MEMORANDUM OPINION ON
MONETARY DAMAGES & INJUNCTIVE RELIEF

(Filed Aug. 28, 1998)

At the conclusion of the liability phase of this case, the court found Joe's Stone Crab, Inc. (Joe's or "the restaurant") guilty of sex discrimination. *See EEOC v. Joe's Stone Crab, Inc.*, 969 F. Supp. 727 (S.D. Fla. 1997). This finding was based on an examination of Joe's employment practices which showed that management delegated total hiring authority to subordinates who, without the benefit of policies[1] or guidelines, used subjective criteria to select only males for food server positions. One high-ranking subordinate conceded that "[i]t was always tradition from the time I arrived there that it was a male server type of job. And until just recently when we became aware that

[1] Joe's chief executive testified "it is not a policy at Joe's to have policy." L.Tr. 2762.

we had to do other things, . . . originally it was traditionally a male place." L.Tr. 1484-85.[2] With one notable exception, Joe's entire seventy-member serving staff was male. Despite what should have been apparent, management never voiced a concern nor questioned the hiring staff's decisions. Indeed, the general manager admitted that it never struck him as odd that female food servers were not being hired. L.Tr. 1467. In this environment, management's silence conveyed approbation. As previously found by the court, "what prevailed at Joe's, albeit not mandated by written policy or verbal direction, was the ethos that female food servers were not to be hired." *Joe's Stone Crab, Inc.*, 969 F. Supp. at 732. And, in fact, they were not. Prior to the EEOC's intervention, female applicants for food server positions at Joe's had no reasonable likelihood of being hired.

During the subsequent trial on damages, Joe's called Gerri Isaacson as a witness in an effort to demonstrate that female applicants are no longer subject to sex discrimination. Ms. Isaacson applied for a food server's position in 1994 but was not selected. Undaunted, she diligently prepared to reapply in 1997. She purchased a commercial serving tray, loaded it with household china and carried it about her apartment, developing the skill to pass Joe's mandatory tray test. Concerned that her past employment might not reflect her ability to meet Joe's

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[2] "L.Tr." refers to the transcript of the fifteen-day bench trial on liability which was conducted in two parts, Aug. 20-29, 1996, and Nov. 19-Dec. 17, 1996. "D.Tr." refers to the transcript of the ten-day bench trial on damages which was conducted on April 15-28, 1998.

stringent standards, she gathered letters of recommendation from satisfied customers to attach to her resume, which she presented to Joe's hiring panel. She arrived early at the '97 roll call[3] and was among the first interviewed. Her efforts paid off. She was invited to "trail" (Joe's term for on-site observation) and ultimately was selected for a coveted food server's position at Joe's, one of Miami Beach's premier restaurants.

Gerri Isaacson's experience epitomizes the goal of this litigation: to ensure that all women who apply to work at Joe's will be evaluated on merit, free from sex discrimination. This is more than an aspiration; it is the law of the land: sex discrimination is illegal. In a community where tourism is a major component of the economy and where food serving positions can be highly remunerative, all individuals must be free to compete on the basis of merit. The Old World notion that it is "classier" to have only male food servers is, at best, a quaint anachronism; it is not a defense to the charge of sex discrimination.

Throughout this litigation, Joe's has sought to portray itself as the hapless victim of a powerful government agency gone awry. Yet it is indisputable that it was not until 1991, *after* the EEOC announced its investigation, that Joe's began to hire female food servers in significant numbers. Until then, virtually every member of the seventy-plus serving staff was male. From 1986 until 1990, in the period just *before* the EEOC announced its

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[3] Each year, on the second Tuesday in October, Joe's conducts a 'roll call' to recruit new servers and fill other positions. The process begins around 10:00 a.m. with introductory remarks and continues throughout the day as applicants are interviewed by a three-person panel.

investigation, the restaurant filled 108 successive vacancies with male applicants. Joe's suggestion that women did not want these jobs but were content to work as kitchen helpers, laundry workers, take-out salespeople, and cashiers is not credible. In 1991, when news of the EEOC's investigation appeared in the local media, women applied in unprecedented numbers. Moreover, interest has continued to grow. At the 1997 roll call, which was advertised in the local press,[4] 35 of 125 applicants, or 28%, were female. Clearly, a new order has begun to take hold at Joe's, albeit under the watchful eye of a court-appointed monitor. The progress that has been achieved is commendable, but it cannot expunge the past. Overwhelming evidence proves that Joe's engaged in blatant, prolonged sex discrimination. Consequently, it is only right -- indeed justice demands -- that Joe's be held accountable for its past illegal activity.

Based on the testimony and evidence presented at the trial on damages, the court makes the following:

FINDINGS OF FACT

1. Joe's newly-hired food servers start on the luncheon shift which has a lesser earning potential than the dinner shift. As they gain experience, servers are assigned

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[4] By court order, advertisements were placed in the Miami Herald, the Sun-Sentinel and the New Times prior to the October 1997 roll call. They read: "Rest. Staff, JOE's STONE CRAB, Dining Rm Employees, Roll Call Tuesday, October 7 @ 10:00 am, EOE & Drug Free Workplace, EXP'D WOMEN & MEN FOR CAREER SERVER POSITIONS, Wear suitable work shoes. Exc. benefits. If interested call: 305-604-9883, 227 Biscayne St., Miami Bch." *See* Def.'s Ex. 28.

to one or more dinner shifts per week. After the first year, most servers move to full-time dinner shift assignments. Consequently, there are three discernible earning periods for Joe's food servers: (1) the first three months of employment (Oct. 15th to Dec. 31st); (2) the first full calendar year of employment (Jan. 1st-Dec. 31st); and (3) succeeding calendar years.

2. Credible expert testimony established that food servers hired at the October '89 roll call earned $2,998 during the first three months of employment. Servers hired at the October '90 roll call earned $3,934 during the same three-month period. And servers hired at the October '91 roll call earned $2,820 during the same initial period. Servers hired at the '89 roll call, earned $12,516 in 1990; $15,392 in 1991; and $19,436 in 1992. Servers hired at the '90 roll call, earned $13,613 in 1991; and $19,436 in 1992. Servers hired at the '91 roll call earned $17,190 in 1992. Thereafter, servers in each of these three groups earned: $21,534 in 1993; $20,219 in 1994; $21,728 in 1995; $26,006 in 1996; and $26,221 in 1997.[5] *See* Pl.'s Ex. 32(b); Def.'s Ex. 35.

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[5] A comparison of the evidence submitted by Joe's during the liability trial with the evidence it produced in the damages trial raises profoundly troubling questions. For example, during the 1996 liability trial when it was to Joe's advantage to show that its servers earned high salaries and, therefore, should be included in a more restrictive census category which would have made it more difficult for the EEOC to lay a statistical foundation to establish sex discrimination, Joe's claimed that 90% of the serving staff earned $2,000 per month in the second year of employment. L.Tr. 2253-54. During the subsequent damages trial, however, when Joe's was attempting to minimize potential damages awards, the restaurant produced statistical evidence showing that its servers actually earned $12,516 in 1990, $15,392 in

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3. Servers do not receive benefits during the first three months of employment at Joe's. Thereafter, the restaurant provides health insurance, life insurance, and profit sharing. The health insurance benefit is valued as follows: 1990: $1,321; 1991: $1,321; 1992: $1,261; 1993: $1,261; 1994: $860; 1995: $944; 1996: $944; 1997: $944. *See* Pl.'s Ex. 15. Plaintiff's and defendant's experts agreed that the profit sharing benefit equaled 2.5% of an employee's annual salary. D.Tr. 534 and 1666. The cost of life insurance was insignificant and, therefore, has not been included by the court. Thus, a server hired at the October '89 roll call received fringe benefits with the following total values: 1989: $0; 1990: $1,634; 1991: $1,706; and 1992: $1,747. A server hired at the October '90 roll call received fringe benefits with the following total values: 1990: $0; 1991: $1,661; and 1992: $1,747. A server hired at the October '91 roll call received fringe benefits with the following total values: 1991: $0; and 1992: $1,691. Servers hired in '89, '90 and '91 received fringe benefits with the following total values: 1993: $1,799; 1994: $1,365; 1995: $1,487; 1996: $1,594; and 1997: $1,600.

4. Until 1996, Joe's opened each year for a seven-month season, October 15th to May 15th. L.Tr. 1652. In 1996 and 1997, the restaurant closed for approximately six

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1991, $19,436 in 1992, $21,534 in 1993, $20,219 in 1994, $21,728 in 1995, $26,006 in 1996, and $26,221 in 1997. Again in the liability trial when it was beneficial to the restaurant to minimize the number of annual openings on its wait staff, Joe's emphasized its low employee turnover. L.Tr. 2476. But in the damages phase, with an eye toward limiting the size of potential back pay awards, Joe's produced statistical data showing that the average tenure for its food servers is three years. *See* Def.'s Ex. 35, tbl. A-2.

weeks during September and the first part of October. L.Tr. 1653.

Catherine Stratford

5. Catherine Stratford moved to Florida in 1990, intending to apply for a food server's position at Joe's at the October 1990 roll call. She was deterred from applying, however, when she learned from at least two sources that it would be useless to attend the roll call because Joe's did not hire female food servers. L.Tr. 324-27. Based on Ms. Stratford's testimony regarding her qualifications as a food server[6] and upon the testimony offered by Joe's regarding the criteria used in hiring food servers,[7] the court finds that Ms. Stratford was fully qualified in 1990 to work as a food server at Joe's. If Ms. Stratford had applied and been hired in October of 1990, she would have continued to work at Joe's through 1995.[8]

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[6] *See generally* L.Tr. 303-24, 327-34, 344-59, 364-70. Specific examples of Ms. Stratford's relevant experience include: training at the Culinary Institute of America in table service, wine service, and the basics of "the whole food industry," L.Tr. 303-04; approximately 20 years of wait staff experience at the time of application at Joe's, L.Tr. 307; "upscale" and "single service" wait staff experience, L.Tr. 309-10; and experience carrying trays as heavy as fifty pounds, L.Tr. 320.

[7] *See generally* L.Tr. 1968-84, 1995-2045 (testimony of Anthony Arneson). Witnesses testifying on behalf of Joe's explained that although Joe's did not have specific written or verbal hiring guidelines, *see, e.g.*, L.Tr. 2009-10, applicants were considered from perspectives including appearance, articulation, attitude and experience. L.Tr. 1969, 1999. Ability to handle heavy food trays was considered a strict requirement. *See* L.Tr. 2042.

[8] To calculate damages, the court must determine the period in which a claimant would have worked at Joe's but for the discriminatory

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6. In 1991, Ms. Stratford heard that Joe's was being investigated by the labor board for engaging in sex discrimination. Therefore, she attended the October 1991 roll call and was interviewed for a food server's position. Ms. Stratford was fully qualified in 1991 to work as a food server at Joe's,[9] however she was not selected because Joe's hiring personnel engaged in sex discrimination.

7. Ms. Stratford actually earned these amounts: 1990 (Nov. 1st-Dec. 31st): $3,600; 1991: $20,550; 1992:

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action. In making this determination, the court has considered the work history of each claimant coupled with the claimant's testimony and other relevant evidence. Included in this evidence is statistical data submitted by Dr. James T. McClave, Joe's expert in statistics and econometrics, showing a high attrition rate for the restaurant's servers. *See* Def.'s Ex. 35, tbl. A-2. From this evidence, Joe's argued that the period of back pay for any successful claimant should be limited to the period established by the cohort's profile (a statistical profile developed from the work histories of servers hired at the roll call at which a claimant would have been hired but for the discrimination). The court, however, has rejected this approach, finding it too mechanistic and impersonal, and in contravention of the well-settled principle that a successful Title VII plaintiff is entitled to be made whole. *See, e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). Title VII damage awards are meant to compensate real people with individual characteristics, documented work histories and identifiable injuries. While statistical evidence has long been admissible in Title VII actions, *see, e.g., Johnson v. Goodyear Tire & Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974), it must be weighed against credible evidence which distinguishes an individual claimant. As an example, one claimant in this case worked for twenty years for a single employer. Two other claimants remained with their employers for periods of eight and ten years respectively. In an industry where high attrition is the norm, a claimant's history of long-term employment is highly significant and, in the court's judgment, outweighs the value of a cohort's profile which, after all, is nothing more than a composite of other peoples' work histories.

[9] *See supra,* n.6.

$18,500; 1993 (Jan. 1st-Aug. 31st): $12,000; 1993 (Sept. 1st-Dec. 31st): $0; 1994: $0; 1995: $0.

8. In September of 1993, Catherine Stratford opened a restaurant called "Picnics on the Beach." The business did not generate a profit in 1993, 1994, or 1995. Consequently, Ms. Stratford earned nothing in these periods. The court finds, however, that Ms. Stratford's effort to start her own business represented a good faith effort on her part to improve her financial position and, as a matter of law, constituted a reasonable method of mitigating her damages. Furthermore, the court finds that it was reasonable for her to continue operating "Picnics on the Beach" during the years it was not generating a profit because there existed a reasonable likelihood that it would become profitable in the future.

9. If Ms. Stratford had been employed at Joe's during its seven-month operating season, she would have had the opportunity to engage in off-season employment. The court finds that she would have utilized this opportunity to earn a minimum of three thousand dollars during each of the five-month off-season periods.[10]

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[10] To reach a final calculation on damages, one must subtract actual earnings from the amount that would have been earned had the defendant employer not engaged in discriminatory conduct. *See, e.g., Darnell v. City of Jasper,* 730 F.2d 653 (11th Cir. 1984). At the trial on damages, Joe's argued that this formula requires the court to subtract what each claimant actually earned during a twelve-month period from the sum that each claimant would have earned during a seven-month season at Joe's. The EEOC disagreed, contending that, to "balance the equation," a reasonable figure for off-season income should be added to Joe's seven-month income figure. To support this contention, the EEOC offered expert testimony suggesting that $5,000 should be imputed as

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10. A comparison of Ms. Stratford's actual earnings with what she would have earned at Joe's, *i.e.*, salary and tips, fringe benefits, and imputed off-season income, shows that she incurred the following deficiencies: 1990 (Oct. 15th-Dec. 31st): $334; 1991: ($2,276);[11] 1992: $5,683; 1993:

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off-season income for each claimant. *See* Pl.'s Ex. 15. Indeed, the EEOC's expert noted that the $5,000 figure originated with Dr. McClave, Joe's expert, and was used by Joe's during the liability trial when the restaurant claimed that its servers earned between $25,000 and $50,000 a year. L.Tr. 2355. In view of the five-month difference between the two work periods, the court concludes that an adjustment is required. Two options suggest themselves. First, a reasonable figure for off-season income could be imputed to a claimant who demonstrated a willingness to pursue such employment. Second, a claimant's actual twelve-month's earnings could be reduced by five-twelfths, thus ensuring that seven months of actual earnings would be subtracted from seven months of Joe's earnings. To evaluate these approaches, the court performed both calculations and found that the latter often generated sums in excess of the EEOC's $5,000 figure. While these numbers are valid as verifiable earned income, they are derived from regular full-time employment and, therefore, almost certainly overstate what could be earned from temporary off-season employment. Accordingly, the court concludes that the better approach is to start with the sum earned during Joe's seven-month season, add a reasonable amount for imputed off-season earnings and subtract the claimant's actual twelve-month's earnings. In determining an amount to be imputed for off-season earnings, the court considered multiple factors, *viz.*, the duration of the off-season (five months), the claimant's level of experience, work history and demonstrated earning capacity, and the amount actually earned by the claimant from full-time employment during the off-season.

[11] A figure in parentheses indicates an amount earned by a claimant which exceeds the amount that a server at Joe's would have earned in the same period. In other words, the claimant earned more money in this period than she would have earned at Joe's. An amount in parentheses, therefore, is not included in the computation of a back pay award. "[B]ecause a discriminatee has a duty to minimize damages and because alternative employment opportunities will sometimes

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$14,333; 1994: $24,584; and 1995: $26,215. Thus, had Ms. Stratford not been the victim of sex discrimination, she would have earned $71,149 more than she actually earned.

Raquel Munoz

11. Raquel Munoz intended to apply for work at Joe's long before the October 1989 roll call. She was dissuaded from applying, however, when she became aware of Joe's reputation for not hiring female food servers. L.Tr. 583-87 and 595-99. Based upon Ms. Munoz's testimony regarding her qualifications as a food server[12] and upon the testimony offered by Joe's regarding the criteria used in hiring food servers,[13] the court finds that Ms. Munoz was fully qualified in 1989 to work as a food server at Joe's. If Ms. Munoz had applied and been hired in October of 1989, she would have continued to work at Joe's through 1996.[14]

12. In 1991, Ms. Munoz learned that Joe's was under investigation for discriminating against female applicants for food server positions. Therefore, she attended the October 1991 roll call and was interviewed for a food

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prove more economically rewarding than the position sought, back pay awards are limited to proven economic loss." *Darnell,* 730 F.2d at 656.

[12] *See generally* L.Tr. 571-602. Specific examples of Ms. Munoz's relevant experience include: approximately 15 years of wait staff experience at the time of her application for employment at Joe's, L.Tr. 573, including experience at a large establishment, L.Tr. 579, "head waitress" experience at an "upscale" establishment with "elegant" clientele, L.Tr. 595, 581, and experience carrying large trays, containing as many as 11 plates, L.Tr. 582.

[13] *See supra,* n.7.

[14] *See supra,* n.8.

server's position. Ms. Munoz was fully qualified for the position[15] but was not selected because the hiring panel engaged in sex discrimination.

13. Ms. Munoz actually earned these amounts: 1989 (Oct. 15th-Dec. 31st): $3,625; 1990: $7,068; 1991: $17,004; 1992: $25,645; 1993: $25,015; 1994: $19,235; 1995: $21,586; and 1996: $16,842. *See* Pl.'s Exs. 9 and 32(b).

14. If Ms. Munoz had been employed at Joe's during its seven-month operating season, she would have had the opportunity to engage in off-season employment. The court finds that Ms. Munoz would have utilized this opportunity in all years except 1990, and would have earned a minimum of three thousand dollars during each of the five-month off-season periods. In 1990, Ms. Munoz refrained from working from May through September because of a difficult pregnancy. She returned to work shortly after the birth of her son. D.Tr. 147.

15. A comparison of Ms. Munoz's actual earnings with what she would have earned at Joe's, *i.e.,* salary and tips, fringe benefits, and imputed off-season income, shows that she incurred the following deficiencies: 1989 (Oct. 15th-Dec. 31st): ($627); 1990: $7,082; 1991: $3,094; 1992: ($1,462); 1993: $1,318; 1994: $5,349; 1995: $4,629; and 1996: $13,758. Thus, had Ms. Munoz not been the victim of sex discrimination, she would have earned $35,230 more than she actually earned.

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[15] *See supra,* n.12.

Carol Coyle

16. Carol Coyle worked as a food server at the Diplomat Hotel in Hollywood, Florida from 1971 until 1991. Sometime in the fall of 1991, she went to Joe's and was interviewed in a "mini-roll call," a process in which a small group of people, (in this instance about twelve), were interviewed by a three-person panel. During this process, Ms. Coyle took and passed the mandatory tray test. In making this finding, the court notes a conflict in the evidence on when the tray test was first administered. Dennis Sutton, Joe's assistant maitre d' and a member of the interview panel, initially said it was given first in " '91, I think." L.Tr. 1422. Later, Mr. Sutton suggested that the test may have been given first in 1992. L.Tr. 1711-12. Ms. Coyle, on the other hand, testified that she took the tray test in 1991. D.Tr. 178-80 and 197-201. There is also a conflict in testimony regarding when Joe's held the first mini-roll call. Anthony Arneson, Joe's lunchtime maitre d', testified that it occurred in February of 1993, D.Tr. 1885, whereas Ms. Coyle testified that one took place in 1991. Based upon the court's ability to observe the demeanor of the witnesses and to consider other criteria for judging their credibility, the court finds Ms. Coyle's testimony to be credible and worthy of belief. Based upon Ms. Coyle's testimony regarding her qualifications as a food server[16] and upon the testimony offered by Joe's regarding the

[16] *See generally* L.Tr. 637-72. Specific examples of Ms. Coyle's relevant experience include: approximately 20 years of wait staff experience at the time she applied at Joe's, L.Tr. 639, including "tuxedo" and "single service" experience at an establishment with a capacity in excess of 300 persons, L.Tr. 640-41. Ms. Coyle's experience also included carrying stacks of up to 6 covered plates. L.Tr. 640, 642.

criteria used in hiring food servers,[17] the court finds that Ms. Coyle was fully qualified in 1991 to work as a food server at Joe's, however she was not selected because the hiring panel engaged in sex discrimination. If Ms. Coyle had been hired by Joe's in 1991, she would have continued in this employment through 1995.[18]

17. Ms. Coyle actually earned these amounts: 1991 (Oct. 15th-Dec. 31st): $3,484; 1992: $18,000; 1993: $20,900; 1994: $22,400; and 1995: $22,400.

18. If Ms. Coyle had been employed at Joe's during its seven-month operating season, she would have gained temporary employment in the off-season, earning a minimum of three thousand dollars in each of the five-month periods.

19. A comparison of Ms. Coyle's actual earnings with what she would have earned at Joe's, *i.e.,* salary and tips, fringe benefits and imputed off-season income, shows that she incurred the following deficiencies: 1991: ($664); 1992: $3,881; 1993: $5,433; 1994: $2,184; and 1995: $3,815. Thus, had Ms. Coyle not been the victim of sex discrimination, she would have earned $15,313 more than she actually earned.

Dawn Keon

20. Dawn Keon stopped at Joe's twice in the fall of 1991 and completed an application for a food server's

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[17] *See supra,* n.7.

[18] *See supra,* n.8.

position. However, she did not attend the October 1991 roll call nor those held in subsequent years. Ms. Keon left Miami Beach in 1992 and moved to Broward County. After evaluating the evidence, the court finds that Ms. Keon failed to prove that she was a victim of sex discrimination. Her testimony that she became aware of Joe's reputation for not hiring female food servers is credible. Nonetheless, the court finds that she was not dissuaded by this information from reapplying at Joe's. She left Miami Beach for reasons unconnected with her failure to obtain employment at Joe's. Finally, based upon a review of Ms. Keon's work experience, the court finds that she failed to establish that she was fully qualified to perform the requirements of a food server at Joe's. Accordingly, Ms. Keon is not entitled to an award of money damages.

Teresa Romanello

21. As early as 1987, Teresa Romanello learned from multiple sources that Joe's did not hire female food servers. She desired to work at Joe's but was dissuaded from applying because of Joe's reputation. L.Tr. 217-23 and 280-81. Based upon Ms. Romanello's testimony regarding her qualifications as a food server[19] and upon the testimony offered by Joe's regarding the criteria used in hiring food servers,[20] the court finds that Ms. Romanello was fully

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[19] *See generally* L.Tr. 199-302. Specific examples of Ms. Romanello's relevant experience include approximately 13 to 14 years of wait staff experience at the time she applied for a position at Joe's, L.Tr. 216-17, including approximately four years of experience at an elegant and large establishment, featuring "single service" where members of the wait staff carried trays weighing up to 50 pounds, L.Tr. 211-13.

[20] *See supra,* n.7.

qualified in 1989 to work as a food server at Joe's. If she had applied and been hired in October of 1989, Ms. Romanello would have worked at Joe's through 1996.[21]

22. Ms. Romanello attended the October 1993 roll call and was interviewed for a food server's position. Although fully qualified to work at Joe's, she was not selected because Joe's hiring personnel engaged in sex discrimination and gave her a lower rating than she deserved.

23. Ms. Romanello actually earned these amounts: 1989 (Oct. 15th-Dec. 31st): $3,979; 1990: $19,500; 1991: $19,500; 1992: $19,500; 1993: $20,000; 1994: $20,000; 1995: $20,500; and 1996: $17,000.

24. If Ms. Romanello had been employed at Joe's during its seven-month operating season, she would have had the opportunity to engage in off-season employment. The court finds that she would have utilized this opportunity and earned a minimum of three thousand dollars during each five-month period except for 1996.[22]

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[21] *See supra,* n.8.

[22] Ms. Romanello testified that when the Sea Shanty, a restaurant she had worked at since 1986, closed on June 5th, 1996, she decided to take some time off. She cited the normal summer slow down and the fact that her husband had won $20,000 in the lottery. D.Tr. 429, 439 and 468. Thus, she removed herself from the workforce for five months. To account for this, the court has not imputed off-season income for 1996. The court, however, has declined to follow Joe's suggestion that Ms. Romanello's husband's lottery winnings should be attributed to her as earnings. *See* Def.'s Ex. 37 and D.Tr. 1761-65. Assuming that lottery winnings are marital property in which each spouse possesses an equitable interest, *see, e.g., In re Fordu,* 209 B.R. 854 (B.A.P. 6th Cir. 1997); *Panganiban v. Panganiban,* 1998 WL 40484, *10-12 (Conn.

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25. A comparison of Ms. Romanello's actual earnings with those that she would have earned at Joe's, *i.e.*, salary and tips, fringe benefits and imputed off-season income, reveals the following: 1989 (October 15th through December 31st): ($981); 1990: ($2,350); 1991: $598; 1992: $4,683; 1993: $6,333; 1994: $4,584; 1995: $5,715; and 1996: $10,600. Thus, had Ms. Romanello not been the victim of sex discrimination, she would have earned $32,513 more than she actually earned.

Injunctive Relief

26. Joe's has taken some steps to eradicate sex discrimination from its hiring practices. For example, when first confronted with the allegations in this case, management substituted a three-person hiring panel for the previous single decision maker. Equally significant, the restaurant began to hire female food servers. At the same time, Joe's resisted the EEOC's request to advertise annual roll calls. This was especially important given Joe's reputation in the food serving community for discriminating against women. Furthermore, the restaurant adamantly refused to engage in a voluntary effort to add

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Super.); *Seizer v. Sessions,* 940 P.2d 261 (Wash. 1997); *In re Marriage of Palacios,* 656 N.E.2d 107, 113 (Ill. App. Ct. 1995), *appeal denied,* 662 N.E.2d 427 (Ill. 1996), there is no justification for attributing the entire sum to the wife. More to the point, it is improper to characterize lottery winnings as earnings for purposes of back pay calculations. Under the collateral source doctrine, funds unrelated to the conduct at issue and received from third parties are not counted as mitigating earnings. *See, e.g., NLRB v. Gullett Gin Co.,* 340 U.S. 361, 364, 71 S.Ct. 337, 339, 95 L.Ed.2d 337 (1951) (court need not reduce back pay award by deducting state unemployment compensation benefits).

greater definition to the four criteria it used to select food servers. *See* Dckt. Entry 167. The court repeatedly voiced its concern that these criteria, *viz.*, appearance, articulation, attitude and experience, were too vague to provide adequate direction to the hiring staff and, therefore, played a role in the discrimination that occurred. Joe's yielded on this point only when the court threatened to prevent the restaurant from hiring additional servers until the hiring criteria were defined. *See* Dckt. Entry 190. In October 1997, at the court's insistence, Joe's instituted formal training for members of the interview panel and utilized a newly-developed server evaluation form. An evidentiary hearing and court order were required to force the restaurant to advertise the 1997 roll call. Joe's position throughout the litigation has been one of "combative denial." In light of the evidence produced,[23] and given the

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[23] During the trial on damages and injunctive relief, the EEOC placed into evidence a two-inch black-and-yellow campaign button that Joe's management distributed to its serving staff in 1997. It states, "JOE'S STAFF, I AM GOVERNMENT APPROVED." *See* Pl.'s Ex. 31. Noting that the necessity for injunctive relief remained a contested issue, the EEOC argued that it was entitled to introduce evidence that provided insight into management's state of mind. As seen by the EEOC, management's action of distributing buttons to male servers who had been hired when Joe's discriminated against women demonstrated management's insensitivity to the serious issues in this case and evidenced its disdain for court-ordered remedial measures. Anticipating the EEOC's offer, Joe's filed a pre-trial motion to exclude any reference to the buttons. Counsel for the restaurant argued that campaign buttons are classic examples of free speech protected by the First Amendment. Joe's counsel further contended that the First Amendment shielded the statements and expressive conduct from criticism by the EEOC and from consideration by the court. No one can take issue with Joe's first premise; campaign buttons do enjoy First Amendment protection. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d

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contentious history of this case, the court finds that the EEOC has established the necessity for mandatory injunctive relief. Joe's, on the other hand, has failed to demonstrate that, absent the strictures of a mandatory injunction, it can be relied upon to refrain from discriminatory conduct. Therefore, the court will enter a mandatory injunction governing Joe's employment practices and hiring decisions until January 1, 2001. This period is shorter than requested by the EEOC but, in the court's judgment, is of sufficient duration to allow remedial measures to take root.

Based on the foregoing, the court reaches the following:

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487 (1995). But the suggestion that the First Amendment provides justification to suppress criticism is truly extraordinary. Indeed, Joe's formulation is antithetical to the core values of the First Amendment. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market. . . . " *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969). It has long been recognized that a party in a civil proceeding may introduce into evidence statements and assertive conduct of an adverse party. *See* Fed. R. Evid. 801(d)(2)(A); *see also Bondie v. Bic Corp.,* 947 F.2d 1531 (6th Cir. 1991). While it is axiomatic that a party may not be punished for having engaged in protected speech, a court is free to consider a party's speech if relevant to an issue in litigation. *See, e.g., United States v. Rosenberg,* 806 F.2d 1169 (3rd Cir. 1986), *cert. denied,* 481 U.S. 1070, 107 S.Ct. 2465, 95 L.Ed.2d 873 (1987). In the case at bar, the meaning of Joe's action of distributing campaign buttons is ambiguous. It is the court's view that the most plausible interpretation is that Joe's was putting a tongue-in-cheek publicity spin on what has been a difficult situation for a restaurant that is conscious of its public image. Accordingly, the court attaches no weight to this act in determining the necessity for future injunctive relief.

CONCLUSIONS OF LAW

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e-2(a)(1) provides that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." The aim of this legislation is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees." *Albemarle Paper Company v. Moody,* 422 U.S. 405, 417-18, 95 S.Ct. 2362, 2371-72, 45 L.Ed.2d 280 (1975) (citing *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-30, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971)). As one method of enforcement, Congress bestowed upon the courts the power to award damages "as part of a complex legislative design directed at an historic evil of national proportions." *Id.* at 416. The aim of a Title VII damages award is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* at 418. Accordingly, a broad range of remedies is available to the court in fashioning a damages award.

One component of a Title VII damage award is back pay, *i.e.,* the compensation that the plaintiff would have received from the employer had the discrimination not occurred. A prevailing plaintiff in a Title VII action is presumptively entitled to back pay. *Nord v. United States Steel Corp.,* 758 F.2d 1462, 1472 (11th Cir. 1985); *see also Weaver v. Casa Gallardo, Inc.,* 922 F.2d 1515, 1526 (11th Cir. 1991). Two overarching principles guide the computation of a back pay award: "(1) unrealistic exactitude is not

required, [and] (2) uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer." *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 260-61 (5th Cir. 1974) (citing *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 n.53 (5th Cir. 1974)). A district court may deny back pay only for reasons which are consistent with the central statutory purposes of Title VII noted above. *Albemarle Paper Co.*, 422 U.S. at 421, 95 S.Ct. at 2373. The fact that an employer may have lacked specific intent to discriminate, or, put differently, was acting in good faith, is not a defense to a back pay award. *Pettway*, 494 F.2d at 253.

Selecting the appropriate starting date is a critical decision in calculating back pay. The traditional rule is that back pay liability begins to accrue on the date of the discriminatory act, *see Velazquez v. Chardon*, 736 F.2d 831 (1st Cir. 1984), but not earlier than two years prior to the filing of the charge of discrimination. *See* 42 U.S.C. § 2000e-5(g)(1). Thus. for example, in the case of an employee terminated because of illegal discrimination, the date of termination serves as the starting date to calculate back pay. *See, e.g., EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1509 (9th Cir. 1989). A different rule applies, however, when a qualified employee was deterred from applying for employment because of the employer's reputation for engaging in discriminatory employment practices. The Supreme Court spoke to this issue in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), and said:

> A consistently enforced discriminatory policy can surely deter job applications from those who are

> aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.
>
> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices – by his consistent discriminatory treatment of actual applicants, by the manner in which he publicized vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

Id. at 365-66, 97 S.Ct. at 1870.

In the case at bar, Catherine Stratford, Raquel Munoz and Teresa Romanello are each entitled to the benefit of this rule. Each of these claimants was deterred from applying for a food server's position at Joe's by the restaurant's reputation for discriminating against women. The court has found that each of these applicants was fully qualified to work at Joe's and would have applied but for the knowledge of Joe's reputation. Under the rule announced in *Teamsters,* these applicants were not obliged to engage in the futile gesture of applying for a food server's position at Joe's when the restaurant was known to adhere

to a policy of not hiring women. Consequently, an award of back pay for each of these applicants must be calculated from the date on which they were first deterred from applying at Joe's because of its reputation.[24]

Back pay damages normally are awarded through the date of judgment. *Nord,* 758 F.2d at 1473. The case at bar, however, presents an exception to the general rule. Here, the court has found that each of the claimants would have voluntarily terminated her employment at Joe's prior to the date of judgment. Therefore, the date of termination is

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[24] The court discussed the rationale for admitting evidence of Joe's reputation in its opinion on liability. *See EEOC v. Joe's Stone Crab, Inc.,* 969 F. Supp. at 736. An additional brief comment, however, is in order. A predecessor judge announced his intention to bifurcate the trial, treating liability first and then, if necessary, damages. *See* Dckt. Entry 49, Status Conf. Hr'g Tr. at 7. Joe's was represented at the status conference and, in the pretrial stipulation, indicated its lack of objection to this procedure. *See* Dckt. Entry 98. During the trial on liability, when the EEOC offered testimony regarding Joe's reputation, Joe's counsel objected, citing "hearsay." L.Tr. 1728. The court overruled this objection, noting that the evidence was not being admitted to prove the charge of discrimination, but only to establish that Joe's had a reputation in the food servers' community for not hiring female food servers. Following the liability trial, the court entered an order finding that the evidence on discrimination, which was separate and apart from the evidence about reputation, proved that Joe's discriminated against women. Thus, the evidence in the liability phase consisted of two components. One established that Joe's discriminated against women. The other proved that restaurant workers in the Miami area were well aware of Joe's discriminatory practices. During the subsequent trial on damages, Joe's attempted to offer evidence to rebut the previously-admitted reputation evidence. The court sustained the EEOC's objection, finding that the liability phase was over, that Joe's had waited too long and that the testimony was not relevant to the issue of damages. The court, however, did allow Joe's to offer evidence about its present reputation, finding it relevant to the issue of whether further injunctive relief was necessary.

the appropriate end point for calculating a back pay award. "Title VII should not put the prevailing claimant in a better position than similar employees who were not discriminated against, but conversely [she] should not be disadvantaged." *Weaver,* 922 F.2d at 1527. Put another way, a Title VII damage award should make the claimant whole, not confer a windfall. When the evidence establishes that a claimant would have terminated her employment voluntarily prior to the date of judgment, the earlier date must be used for back pay calculations. In circumstances such as these, " '[t]he court must 'do its best to recreate the conditions and relationships that would have existed if the unlawful discrimination had not occurred.' " *EEOC v. Ilona of Hungary, Inc.,* 108 F.3d 1569, 1580 (7th Cir. 1997) (reversing back pay award where evidence showed that employee intended to quit her job before she was illegally terminated) (quoting *United States v. City of Chicago,* 853 F.2d 572, 575 (7th Cir. 1988)).

Back pay encompasses more than salary and tips. Fringe benefits such as vacation, sick pay, insurance and retirement benefits are included as well. *Pettway,* 494 F.2d at 263; *see also Crabtree v. Baptist Hosp. of Gadsden, Inc.,* 749 F.2d 1501 (11th Cir. 1985). Because Joe's provided health insurance and profit sharing, which have been valued in paragraph 3, *supra,* these sums are properly included as part of each claimant's back pay award.

As previously noted, an award of back pay is intended to make the claimant whole, not to confer a windfall. To this end, Title VII provides: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g)(1). Thus, in calculating a back pay award, the trial court must

determine what the employee would have earned had she not been the victim of discrimination, and must subtract from this figure the amount of actual interim earnings. Moreover, this calculation must be performed according to a quarterly earnings formula which has gained court approval. *See Darnell v. City of Jasper,* 730 F.2d 653, 656-57 (11th Cir. 1984). The totals reflected in ¶¶ 10, 15, 19 and 25 have been computed in accordance with this approach.

To be eligible for a back pay award, a claimant must mitigate her damages by seeking employment "substantially equivalent" to the position she was denied. *Weaver,* 922 F.2d at 1527. " 'Substantially equivalent employment' is employment that affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status to those available to employees holding the position from which the Title VII claimant has been discriminatorily terminated. If the former employee cannot find substantially equivalent employment, [she] may 'lower [her] sights' and accept noncomparable employment." *Id.*

While every claimant has a duty to exercise reasonable diligence in attempting to mitigate damages, the defendant has the burden of proving that a claimant has failed to discharge her duty. *See Smith v. Great Am. Restaurants, Inc.,* 969 F.2d 430, 438 (7th Cir. 1992). Thus, a defendant must show that a claimant did not make reasonable efforts to obtain comparable work, or that comparable work was available and the claimant did not seek it out. *Sellers v. Delgado Community College,* 839 F.2d 1132, 1139 (5th Cir. 1988). Joe's attempted to satisfy this burden by contending that Catherine Stratford's decision to become self-employed by opening a restaurant

did not constitute a reasonable effort to obtain comparable work. Case law, however, suggests that a claimant's decision to become self-employed may constitute reasonable diligence for purposes of the back pay determination. *See, e.g., Nord,* 758 F.2d at 1471 (finding it reasonable for plaintiff to turn her attention to setting up a business with her husband after searching unsuccessfully for employment); *Smith,* 969 F.2d at 438 ("The notion that starting one's own business cannot constitute comparable employment for mitigation purposes not only lacks support in the cases, but has a distinctly un-American ring."); *Carden v. Westinghouse Elec. Corp.,* 850 F.2d 996, 1005 (3d Cir. 1988) (plaintiff's choice to start his own business was reasonable method to mitigate damages); and *Taylor v. Central Pa. Drug and Alcohol Servs. Corp.,* 890 F. Supp. 360, 372-73 (M.D. Pa. 1995) (effort to mitigate back pay damages by starting own business was laudable effort and did not constitute voluntary withdrawal from labor market).

A self-employed person is "employed" for the purposes of mitigating damages if establishing a business of his own was a reasonable alternative to finding other comparable employment. *Carden,* 850 F.2d at 1005. The claimant's duty to mitigate does not require success, but only "an honest, good faith effort." *Smith,* 969 F.2d at 438. In *Smith,* for example, a discharged plaintiff initially sought employment through an agency and newspaper listings. Within a short time – approximately a week – she began planning her own restaurant enterprise. In the final analysis, Smith's restaurant did not show a net profit until its third year, but its gross revenues were increasing. Smith's efforts in opening and operating her restaurant "were serious and in fact much *greater* than required by an ordinary full-time job." *Id.* (emphasis in original). The jury

awarded Smith back pay for thirty-four months. In affirming the jury's verdict, the Court of Appeals stated:

> Given that Smith's decision to open her own restaurant was a reasonable effort at alternative employment, we must ask whether such self-employment remained reasonable for the entire period covered by the jury's award. The [statute] must not be used as a tool for insuring a plaintiff's fledgling business while it continues to sustain losses. Damages should ordinarily extend only to the date upon with [sic] 'the sting of any discriminatory conduct [has] ended.'

Id. at 438-39 (citation omitted). Thus, unprofitability during the initial stages of operation will not, by itself, establish that the enterprise was an unreasonable method of mitigating damages. *See also Nord,* 758 F.2d at 1472 (claimant entitled to back pay for six to eight months spent initiating own business without remuneration).

The burden to prove that the claimant's decision to open her own business was not a reasonable method of mitigating damages falls on the defendant. *Carden,* 850 F.2d at 1005. In the case at bar, Joe's failed to sustain this burden. It proved only that Ms. Stratford's business ultimately failed. Accordingly, as noted in paragraph 8, *supra,* the court concludes that Catherine Stratford satisfactorily established that she reasonably attempted to mitigate her damages by starting her own business.

"Title VII authorizes prejudgment interest as part of the backpay remedy. . . . The backpay award authorized by [Title VII] is a manifestation of Congress' intent to make persons whole for injuries suffered through past discrimination. Prejudgment interest, of course, is an element of complete compensation." *Loeffler v. Frank,* 486 U.S. 549,

558-59, 108 S.Ct. 1965, 1970-71, 100 L.Ed.2d 549 (1988) (internal quotation marks and citations omitted); *see also EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507 (11th Cir. 1987); *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931 (1st Cir. 1995). An award of prejudgment interest adjusts the back pay award for inflation and reflects the present day value of income that should have been paid to the claimant in the past. To determine the appropriate interest rate, courts have traditionally turned to the National Labor Relations Act (NLRA) for guidance. *See e.g., Brown v. A.J. Gerrard Mfg. Co.*, 715 F.2d 1549 (11th Cir. 1983) (en banc) (per curiam). Under the NLRA there has been a consistent practice of awarding prejudgment interest on back pay awards. Furthermore, in 1977, the National Labor Relations Board adopted the Internal Revenue Service's (IRS) prime rates and rejected the traditional flat six percent interest rate. The Eleventh Circuit has held that the IRS prime rates are to be used to calculate the amount of prejudgment interest on back pay awards in Title VII cases. *See Guardian Pools, Inc.*, 828 F.2d at 1512. Accordingly, in the exercise of its discretion, the court concludes that each of the claimants is entitled to prejudgment interest on their back pay award, and the court shall reserve jurisdiction to receive additional evidence on the calculation of prejudgment interest. *See, e.g., Taylor,* 890 F. Supp. at 369 (citing *Guardian Pools* and approving adoption of IRS overpayment rates pursuant to 26 U.S.C. § 6621(a)(1) as better reflecting lost investment opportunities).

A prevailing plaintiff in a Title VII action is also presumptively entitled to reinstatement or, if that is impracticable, front pay in lieu of reinstatement. *See Nord,* 758 F.2d at 1473 (district court must set forth

circumstances warranting denial of reinstatement or front pay) and *Weaver,* 922 F.2d at 1528. Because a monetary award of front pay is calculated to end on the date that the discrimination victim attains the position she would have been in but for the discrimination, front pay is appropriate only when the other damages awarded do not fully compensate the plaintiff. *Weaver,* 922 F.2d at 1529. Inasmuch as the court previously determined that each of the claimants in the case at bar would have voluntarily terminated her employment at Joe's prior to the date of the entry of final judgment, neither reinstatement nor front pay is warranted.

The Supreme Court has ruled that back pay awards are taxable under the Internal Revenue Code. *United States v. Burke,* 504 U.S. 229, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992). Consequently, a district court, in the exercise of its discretion, may include a tax component in a lump sum back pay award to compensate prevailing Title VII plaintiffs. *Sears v. Atchison, Topeka & Santa Fe Ry.,* 749 F.2d 1451, 1456 (10th Cir. 1984) (particularly appropriate where protracted litigation was involved). This accords with a prevailing practice in the settlement of Title VII suits which commonly include an amount to offset the plaintiff/taxpayer's increased liability. In the case at bar, however, the EEOC failed to provide sufficient competent foundation evidence to permit the court to make these calculations. Therefore, the court declines to award money damages to offset whatever increased tax liability a claimant will experience by receiving a lump sum award.

Where discrimination in violation of Title VII occurs, the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like

discrimination in the future." *Louisiana v. United States,* 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965). *Albemarle Paper Co.,* 422 U.S. at 418, 95 S.Ct. at 2372. Toward the end of preventing past discrimination from recurring, victims of employment discrimination are generally entitled to an injunction against future discrimination. The exception to this general rule is when the employer proves that it is unlikely to repeat the discriminatory practice or practices. *See, e.g., Hacienda Hotel,* 881 F.2d at 1519. An employer that undertakes curative steps only after it has been sued for its discriminatory conduct does not thereby "provide sufficient assurances that it will not repeat the violation to justify denying an injunction." *EEOC v. Goodyear Aerospace Corp.,* 813 F.2d 1539, 1544 (9th Cir. 1987).

DECRETAL PROVISIONS

Accordingly, it is **ORDERED, ADJUDGED** and **DECREED** that:

(1) Upon conclusion of the hearing to determine the amount of prejudgment interest, a final judgment will be entered in favor of Catherine Stratford and against Joe's Stone Crab, Inc. for the sum of $71,149 plus prejudgment interest.

(2) Upon conclusion of the hearing to determine the amount of prejudgment interest, a final judgment will be entered in favor [sic] Raquel Munoz and against Joe's Stone Crab, Inc. for the sum of $35,230 plus prejudgment interest.

(3) Upon conclusion of the hearing to determine the amount of prejudgment interest, a final judgment will be

entered in favor of Carol Coyle and against Joe's Stone Crab, Inc. for the sum of $15,313 plus prejudgment interest.

(4) Upon conclusion of the hearing to determine the amount of prejudgment interest, a final judgment will be entered in favor of Teresa Romanello and against Joe's Stone Crab, Inc. for the sum of $32,513.

(5) Upon the filing of this memorandum opinion, and pursuant to Rule 58, Fed.R.Civ.P., the clerk shall enter final judgment in favor of the EEOC and against Joe's Stone Crab, Inc., permanently enjoining Joe's Stone Crab, Inc. from discriminating against female applicants for food server positions. To this end, Joe's Stone Crab, Inc. is further ordered to implement and adhere to these requirements:

> (A) Within twenty days of the entry of this order, the directors of Joe's Stone Crab, Inc., shall convene a formal meeting and adopt a corporate resolution indicating that Joe's is an equal opportunity employer and shall conduct its hiring practices in accord with the requirements of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1). While the resolution may indicate Joe's corporate employment policy of not discriminating on the basis of race, color, religion, sex, or national origin, it shall expressly state Joe's policy of not discriminating on the basis of sex in the hiring of food servers.
>
> (B) An authenticated copy of the corporate resolution shall be filed with the clerk of court and provided to the EEOC within five days of its adoption.

(C) The corporation's policy shall be communicated orally and in writing to all subordinates involved in the process of hiring food servers.

(D) The corporation's policy shall be announced by management during the opening remarks at the annual roll call.

(E) For the period between the date of the entry of this order and January 1, 2001, Joe's shall follow the practices and procedures that were ordered by this court for the conduct of the October 1997 roll call. During the period between the date of the entry of this order and January 1, 2001, Joe's shall not alter the method by which it evaluates and hires applicants for food server positions without obtaining prior approval of this court.

(F) Until January 1, 2001, Joe's shall inform all individuals selected by the restaurant for a food server's position that the offer of employment is deemed conditional and shall not be final unless and until this court approves the report submitted by the court-appointed monitor.

(G) Upon the entry of this order, Joe's shall authorize and bear the costs associated with the completion of a criterion-related validation study of the evaluation criteria used to select and hire food servers. This study shall be conducted by an industrial psychologist and shall be completed within thirty months of the entry of this order. A copy of the study and its results shall be filed with the court, and provided to the EEOC.

(H) The roll calls to be conducted in 1998, 1999, and 2000 shall conform with the following requirements:

(i) Roll calls shall be advertised in the Miami Herald and the Sun-Sentinel in the Friday, Saturday and Sunday editions on the two weekends preceding the roll call. They shall be advertised in the New Times, a weekly publication, during the two weeks immediately preceding the roll call. The content, size of the overall advertisement, and size of the print in the advertisement shall be the same as that introduced into evidence in this case. *See* Def. Ex. 28.

(ii) For the two-week period in which the advertisements appear in the press, Joe's shall maintain a recorded call-in information line. The information provided in the recorded message shall be filed with the court and provided to the EEOC.

(iii) Joe's interview panel shall consist of at least three persons. Prior to the day of roll call, the members of the interview panel and designated alternates shall participate in a training session conduced by Dr. Karl Galen Kroeck, or a substitute industrial psychologist. Each training session, which shall last a minimum of four hours, shall utilize the server interview training manual and server interview evaluation form developed by Dr. Kroeck. In addition, each session shall include mock interviews with live applicants.

(iv) The restaurant entrance to be used by applicants at the roll call shall

be marked clearly and other entrances shall be marked to direct applicants to the proper door.

(v) By 8:00 a.m. on the day of the roll call, Joe's shall post a sign-up sheet outside the appropriate entrance. After applicants have been admitted to the restaurant, and following management's introductory comments, applicants shall be interviewed in the order in which they arrived and signed-in. Only applicants who arrived before the delivery of the management's introductory comments shall be entitled to be interviewed. Applicants not present when called for an interview shall not be entitled to a later interview.

(vi) Joe's may decline to interview any applicant who does not qualify for employment pursuant to Joe's corporate policy, *e.g.*, a recently discharged employee.

(vii) All applicants shall be required to take and pass a standardized tray test. Applicants who pass the tray test shall be interviewed by the three-person panel. Each panel member interviewing and evaluating applicants for food server positions shall utilize the server interview training manual and the server interview evaluation form developed by Dr. Kroeck. *See* Def.'s Ex. 33.

(viii) In addition to other requirements established by law, Joe's shall retain all applications, scoring sheets and

other documentation used during the hiring process. Joe's shall make this documentation available to the EEOC for inspection and copying within seventy-two hours of the completion of the roll call.

(ix) A court-appointed monitor shall attend the roll calls. The monitor shall be appointed in a separate order and shall be compensated by Joe's pursuant to the terms of the court's order. Within five days of the completion of the roll call, the monitor shall file a written report indicating the total number of applicants interviewed, their gender, the total number of servers selected by Joe's, and their gender. A copy of the report shall be provided to each party at the time of filing. Each party shall have ten days from the receipt of the report to file objections to the practices, procedures and hiring decisions reached at the roll call. No decision reached at the roll call shall be deemed final until the court has ruled upon objections following the monitor's report. If necessary, the court will conduct a hearing on these issues.

(x) The EEOC shall be entitled to have up to two observers present at the roll calls.

(6) The court shall reserve jurisdiction over the cause and the parties to enforce the terms and conditions of injunctive relief, and to assess costs in favor of the EEOC.

DONE and SIGNED in Chambers at West Palm Beach, Florida, this 28th day of August, 1998.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
U.S. District Judge

Copies provided to:

Gedety N. Serralta, Esq.
Robert D. Soloff, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

JOE'S STONE CRAB, INC.,

Defendant. /

CASE NO. 93-1082-CIV-HURLEY

PARTIAL FINAL JUDGMENT

(Filed Aug. 13, 1998)

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, partial final judgment is entered on behalf of the EEOC and against Joe's Stone Crab, Inc., permanently enjoining Joe's Stone Crab, Inc. from discriminating against female applicants for food server positions. To this end, Joe's Stone Crab, Inc. is further **ORDERED** to implement and adhere to the following requirements:

> (A) Within twenty days of the entry of this order, the directors of Joe's Stone Crab, Inc., shall convene a formal meeting and adopt a corporate resolution indicating that Joe's is an equal opportunity employer and shall conduct its hiring practices in accord with the requirements of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1). While the resolution may indicate Joe's corporate employment policy of not discriminating

on the basis of race, color, religion, sex, or national origin, it shall expressly state Joe's policy of not discriminating on the basis of sex in the hiring of food servers.

(B) An authenticated copy of the corporate resolution shall be filed with the clerk of court and provided to the EEOC within five days of its adoption.

(C) The corporation's policy shall be communicated orally and in writing to all subordinates involved in the process of hiring food servers.

(D) The corporation's policy shall be announced by management during the opening remarks at the annual roll call.

(E) For the period between the date of the entry of this order and January 1, 2001, Joe's shall follow the practices and procedures that were ordered by this court for the conduct of the October 1997 roll call. During the period between the date of the entry of this order and January 1, 2001, Joe's shall not alter the method by which it evaluates and hires applicants for food server positions without obtaining prior approval of this court.

(F) Until January 1, 2001, Joe's shall inform al individuals selected by the restaurant for a food server's position that the offer of employment is deemed conditional and shall not be final unless and until this court approves the report submitted by the court-appointed monitor.

(G) Upon the entry of this order, Joe's shall authorize and bear the costs associated with

the completion of a criterion-related validation study of the evaluation criteria used to select and hire food servers. This study shall be conducted by an industrial psychologist and shall be completed within thirty months of the entry of this order. A copy of the study and its results shall be filed with the court, and provided to the E.E.O.C.

(H) The roll calls to be conducted in 1998, 1999, and 2000 shall conform with the following requirements:

> (i) Roll calls shall be advertised in the Miami Herald and the Sun-Sentinel in the Friday, Saturday and Sunday editions on the two weekends preceding the roll call. They shall be advertised in the New Times, a weekly publication, during the two weeks immediately preceding the roll call. The content, size of the overall advertisement, and size of the print in the advertisement shall be the same as that introduced into evidence in this case. *See* Def. Ex. 28.
>
> (ii) For the two-week period in which the advertisements appear in the press, Joe's shall maintain a recorded call-in information line. The information provided in the recorded message shall be filed with the court and provided to the EEOC.
>
> (iii) Joe's interview panel shall consist of at least three persons. Prior to the day of roll call, the members of the

interview panel and designated alternates shall participate in a training session conducted by Dr. Karl Galen Kroeck, or a substitute industrial psychologist. Each training session, which shall last a minimum of four hours, shall utilize the server interview training manual and server interview evaluation form developed by Dr. Kroeck. In addition, each session shall include mock interviews with live applicants.

(iv) The restaurant entrance to be used by applicants at the roll call shall be marked clearly and other entrances shall be marked to direct applicants to the proper door.

(v) By 8:00 a.m. on the day of the roll call, Joe's shall post a sign-up sheet outside the appropriate entrance. After applicants have been admitted to the restaurant, and following management's introductory comments, applicants shall be interviewed in the order in which they arrived and signed-in. Only applicants who arrived before the delivery of the management's introductory comments shall be entitled to be interviewed. Applicants not present when called for an interview shall not be entitled to a later interview.

(vi) Joe's may decline to interview any applicant who does not qualify for

employment pursuant to Joe's corporate policy, *e.g.*, a recently discharged employee.

(vii) All applicants shall be required to take and pass a standardized tray test. Applicants who pass the tray test shall be interviewed by the three-person panel. Each panel member interviewing and evaluating applicants for food server positions shall utilize the server interview training manual and the server interview evaluation form developed by Dr. Kroeck. *See* Def.'s Ex. 33.

(viii) In addition to other requirements established by law, Joe's shall retain all applications, scoring sheets and other documentation used during the hiring process. Joe's shall make this documentation available to the EEOC for inspection and copying within seventy-two hours of the completion of the roll call.

(ix) A court-appointed monitor shall attend the roll calls. The monitor shall be appointed in a separate order and shall be compensated by Joe's pursuant to the terms of the court's order. Within five days of the completion of the roll call, the monitor shall file a written report indicating the total number of applicants interviewed, their gender, the total number of servers selected by Joe's, and their gender. A copy of the report shall be provided to each party at the time of

filing. Each party shall have ten days from the receipt of the report to file objections to the practices, procedures and hiring decisions reached at the roll call. No decision reached at the roll call shall be deemed final until the court has ruled upon objections following the monitor's report. If necessary, the court will conduct a hearing on these issues.

(x) The EEOC shall be entitled to have up to two observers present at the roll calls.

The court shall reserve jurisdiction over the cause and the parties to enforce the terms and conditions of injunctive relief, to access costs in favor of the EEOC, and to enter partial final judgment for monetary relief on behalf of the aggrieved claimants following a hearing on the amount of prejudgment interest owed.

ENTERED at West Palm Beach, Florida, this 13th day of August, 1998.

Carlos Juenke
Clerk of Court

By: /s/ James E. Caldwell
James Caldwell,
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EQUAL EMPLOYMENT
OPPORTUNITY
COMMISSION,

Plaintiff,

CASE NO.:
93-1082-CIV-HURLEY

v.

JOE'S STONE CRAB, INC.,

Defendant. /

MEMORANDUM OPINION ON
MONETARY DAMAGES & INJUNCTIVE RELIEF

At the conclusion of the liability phase of this case, the court found Joe's Stone Crab, Inc. (Joe's or "the restaurant") guilty of sex discrimination. *See EEOC v. Joe's Stone Crab, Inc.*, 969 F. Supp. 727 (S.D. Fla. 1997). This finding was based on an examination of Joe's employment practices which showed that management delegated total hiring authority to subordinates who, without the benefit of policies[1] or guidelines, used subjective criteria to select only males for food server positions. One high-ranking subordinate conceded that "[i]t was always tradition from the time I arrived there that it was a male server type of job. And until just recently when we became aware that we had to do other things, . . . originally it was traditionally a male place." L.Tr. 1484-85.[2] With one notable

[1] Joe's chief executive testified "it is not a policy at Joe's to have policy." L.Tr. 2762.

[2] "L.Tr." refers to the transcript of the fifteen-day bench trial on liability which was conducted in two parts, Aug. 20-29, 1996, and Nov.

(Continued on following page)

exception, Joe's entire seventy-member serving staff was male. Despite what should have been apparent, management never voiced a concern nor questioned the hiring staff's decisions. Indeed, the general manager admitted that it never struck him as odd that female food servers were not being hired. L.Tr. 1467. In this environment, management's silence conveyed approbation. As previously found by the court, "what prevailed at Joe's, albeit not mandated by written policy or verbal direction, was the ethos that female food servers were not to be hired." *Joe's Stone Crab, Inc.*, 969 F. Supp. at 732. And, in fact, they were not. Prior to the EEOC's intervention, female applicants for food server positions at Joe's had no reasonable likelihood of being hired.

During the subsequent trial on damages, Joe's called Gerri Isaacson as a witness in an effort to demonstrate that female applicants are no longer subject to sex discrimination. Ms. Isaacson applied for a food server's position in 1994 but was not selected. Undaunted, she diligently prepared to reapply in 1997. She purchased a commercial serving tray, loaded it with household china and carried it about her apartment, developing the skill to pass Joe's mandatory tray test. Concerned that her past employment might not reflect her ability to meet Joe's stringent standards, she gathered letters of recommendation from satisfied customers to attach to her resume, which she presented to Joe's hiring panel. She arrived

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19-Dec. 17, 1996. "D.Tr." refers to the transcript of the ten-day bench trial on damages which was conducted on April 15-28, 1998.

early at the '97 roll call[3] and was among the first interviewed. Her efforts paid off. She was invited to "trail" (Joe's term for on-site observation) and ultimately was selected for a coveted food server's position at Joe's, one of Miami Beach's premier restaurants.

Gerri Isaacson's experience epitomizes the goal of this litigation: to ensure that all women who apply to work at Joe's will be evaluated on merit, free from sex discrimination. This is more than an aspiration; it is the law of the land: sex discrimination is illegal. In a community where tourism is a major component of the economy and where food serving positions can be highly remunerative, all individuals must be free to compete on the basis of merit. The Old World notion that it is "classier" to have only male food servers is, at best, a quaint anachronism; it is not a defense to the charge of sex discrimination.

Throughout this litigation, Joe's has sought to portray itself as the hapless victim of a powerful government agency gone awry. Yet it is indisputable that it was not until 1991, *after* the EEOC announced its investigation, that Joe's began to hire female food servers in significant numbers. Until then, virtually every member of the seventy-plus serving staff was male. From 1986 until 1990, in the period just *before* the EEOC announced its investigation, the restaurant filled 108 successive vacancies with male applicants. Joe's suggestion that women did not want these jobs but were content to work as kitchen

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[3] Each year, on the second Tuesday in October, Joe's conducts a 'roll call' to recruit new servers and fill other positions. The process begins around 10:00 a.m. with introductory remarks and continues throughout the day as applicants are interviewed by a three-person panel.

helpers, laundry workers, take-out salespeople, and cashiers is not credible. In 1991, when news of the EEOC's investigation appeared in the local media, women applied in unprecedented numbers. Moreover, interest has continued to grow. At the 1997 roll call, which was advertised in the local press,[4] 35 of 125 applicants, or 28%, were female. Clearly, a new order has begun to take hold at Joe's, albeit under the watchful eye of a court-appointed monitor. The progress that has been achieved is commendable, but it cannot expunge the past. Overwhelming evidence proves that Joe's engaged in blatant, prolonged sex discrimination. Consequently, it is only right – indeed justice demands – that Joe's be held accountable for its past illegal activity.

Based on the testimony and evidence presented at the trial on damages, the court makes the following:

FINDINGS OF FACT

1. Joe's newly-hired food servers start on the luncheon shift which has a lesser earning potential than the dinner shift. As they gain experience, servers are assigned to one or more dinner shifts per week. After the first year, most servers move to full-time dinner shift assignments. Consequently, there are three discernible earning periods

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[4] By court order, advertisements were placed in the Miami Herald, the Sun-Sentinel and the New Times prior to the October 1997 roll call. They read: "Rest. Staff, JOE'S STONE CRAB, Dining Rm Employees, Roll Call Tuesday, October 7 @ 10:00 am, EOE & Drug Free Workplace, EXP'D WOMEN & MEN FOR CAREER SERVER POSITIONS, Wear suitable work shoes. Exc. benefits. If interested call: 305-604-9883, 227 Biscayne St., Miami Bch." *See* Def.'s Ex. 28.

for Joe's food servers: (1) the first three months of employment (Oct. 15th to Dec. 31st); (2) the first full calendar year of employment (Jan. 1st-Dec. 31st); and (3) succeeding calendar years.

2. Credible expert testimony established that food servers hired at the October '89 roll call earned $2,998 during the first three months of employment. Servers hired at the October '90 roll call earned $3,934 during the same three-month period. And servers hired at the October '91 roll call earned $2,820 during the same initial period. Servers hired at the '89 roll call, earned $12,516 in 1990; $15,392 in 1991; and $19,436 in 1992. Servers hired at the '90 roll call, earned $13,613 in 1991; and $19,436 in 1992. Servers hired at the '91 roll call earned $17,190 in 1992. Thereafter, servers in each of these three groups earned: $21,534 in 1993; $20,219 in 1994; $21,728 in 1995; $26,006 in 1996; and $26,221 in 1997.[5] *See* Pl.'s Ex. 32(b); Def.'s Ex. 35.

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[5] A comparison of the evidence submitted by Joe's during the liability trial with the evidence it produced in the damages trial raises profoundly troubling questions. For example, during the 1996 liability trial when it was to Joe's advantage to show that its servers earned high salaries and, therefore, should be included in a more restrictive census category which would have made it more difficult for the EEOC to lay a statistical foundation to establish sex discrimination, Joe's claimed that 90% of the serving staff earned $2,000 per month in the second year of employment. L.Tr. 2253-54. During the subsequent damages trial, however, when Joe's was attempting to minimize potential damages awards, the restaurant produced statistical evidence showing that its servers actually earned $12,516 in 1990, $15,392 in 1991, $19,436 in 1992, $21,534 in 1993, $20,219 in 1994, $21,728 in 1995, $26,006 in 1996, and $26,221 in 1997. Again in the liability trial when it was beneficial to the restaurant to minimize the number of annual openings on its wait staff, Joe's emphasized its low employee

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3. Servers do not receive benefits during the first three months of employment at Joe's. Thereafter, the restaurant provides health insurance, life insurance, and profit sharing. The health insurance benefit is valued as follows: 1990: $1,321; 1991: $1,321; 1992: $1,261; 1993: $1,261; 1994: $860; 1995: $944; 1996: $944; 1997: $944. *See* Pl.'s Ex. 15. Plaintiff's and defendant's experts agreed that the profit sharing benefit equaled 2.5% of an employee's annual salary. D.Tr. 534 and 1666. The cost of life insurance was insignificant and, therefore, has not been included by the court. Thus, a server hired at the October '89 roll call received fringe benefits with the following total values: 1989: $0; 1990: $1,634; 1991: $1,706; and 1992: $1,747. A server hired at the October '90 roll call received fringe benefits with the following total values: 1990: $0; 1991: $1,661; and 1992: $1,747. A server hired at the October '91 roll call received fringe benefits with the following total values: 1991: $0; and 1992: $1,691. Servers hired in '89, '90 and '91 received fringe benefits with the following total values: 1993: $1,799; 1994: $1,365; 1995: $1,487; 1996: $1,594; and 1997: $1,600.

4. Until 1996, Joe's opened each year for a seven-month season, October 15th to May 15th. L.Tr. 1652. In 1996 and 1997, the restaurant closed for approximately six weeks during September and the first part of October. L.Tr. 1653.

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turnover. L.Tr. 2476. But in the damages phase, with an eye toward limiting the size of potential back pay awards, Joe's produced statistical data showing that the average tenure for its food servers is three years. *See* Def.'s Ex. 35, tbl. A-2.

Catherine Stratford

5. Catherine Stratford moved to Florida in 1990, intending to apply for a food server's position at Joe's at the October 1990 roll call. She was deterred from applying, however, when she learned from at least two sources that it would be useless to attend the roll call because Joe's did not hire female food servers. L.Tr. 324-27. Based on Ms. Stratford's testimony regarding her qualifications as a food server[6] and upon the testimony offered by Joe's regarding the criteria used in hiring food servers,[7] the court finds that Ms. Stratford was fully qualified in 1990 to work as a food server at Joe's. If Ms. Stratford had applied and been hired in October of 1990, she would have continued to work at Joe's through 1995.[8]

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[6] *See generally* L.Tr. 303-24, 327-34, 344-59, 364-70. Specific examples of Ms. Stratford's relevant experience include: training at the Culinary Institute of America in table service, wine service, and the basics of "the whole food industry," L.Tr. 303-04; approximately 20 years of wait staff experience at the time of application at Joe's, L.Tr. 307; "upscale" and "single service" wait staff experience, L.Tr. 309-10; and experience carrying trays as heavy as fifty pounds, L.Tr. 320.

[7] *See generally* L.Tr. 1968-84, 1995-2045 (testimony of Anthony Arneson). Witnesses testifying on behalf of Joe's explained that although Joe's did not have specific written or verbal hiring guidelines, *see, e.g.,* L.Tr. 2009-10, applicants were considered from perspectives including appearance, articulation, attitude and experience. L.Tr. 1969, 1999. Ability to handle heavy food trays was considered a strict requirement. *See* L.Tr. 2042.

[8] To calculate damages, the court must determine the period in which a claimant would have worked at Joe's but for the discriminatory action. In making this determination, the court has considered the work history of each claimant coupled with the claimant's testimony and other relevant evidence. Included in this evidence is statistical data submitted by Dr. James T. McClave, Joe's expert in statistics and econometrics, showing a high attrition rate for the restaurant's servers.

(Continued on following page)

6. In 1991, Ms. Stratford heard that Joe's was being investigated by the labor board for engaging in sex discrimination. Therefore, she attended the October 1991 roll call and was interviewed for a food server's position. Ms. Stratford was fully qualified in 1991 to work as a food server at Joe's,[9] however she was not selected because Joe's hiring personnel engaged in sex discrimination.

7. Ms. Stratford actually earned these amounts: 1990 (Nov. 1st-Dec. 31st): $3,600; 1991: $20,550; 1992: $18,500; 1993 (Jan. 1st-Aug. 31st): $12,000; 1993 (Sept. 1st-Dec. 31st): $0; 1994: $0; 1995: $0.

See Def.'s Ex. 35, tbl. A-2. From this evidence, Joe's argued that the period of back pay for any successful claimant should be limited to the period established by the cohort's profile (a statistical profile developed from the work histories of servers hired at the roll call at which a claimant would have been hired but for the discrimination). The court, however, has rejected this approach, finding it too mechanistic and impersonal, and in contravention of the well-settled principle that a successful Title VII plaintiff is entitled to be made whole. *See, e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). Title VII damage awards are meant to compensate real people with individual characteristics, documented work histories and identifiable injuries. While statistical evidence has long been admissible in Title VII actions, *see, e.g., Johnson v. Goodyear Tire & Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974), it must be weighed against credible evidence which distinguishes an individual claimant. As an example, one claimant in this case worked for twenty years for a single employer. Two other claimants remained with their employers for periods of eight and ten years respectively. In an industry where high attrition is the norm, a claimant's history of long-term employment is highly significant and, in the court's judgment, outweighs the value of a cohort's profile which, after all, is nothing more than a composite of other peoples' work histories.

[9] *See supra,* n.6.

8. In September of 1993, Catherine Stratford opened a restaurant called "Picnics on the Beach." The business did not generate a profit in 1993, 1994, or 1995. Consequently, Ms. Stratford earned nothing in these periods. The court finds, however, that Ms. Stratford's effort to start her own business represented a good faith effort on her part to improve her financial position and, as a matter of law, constituted a reasonable method of mitigating her damages. Furthermore, the court finds that it was reasonable for her to continue operating "Picnics on the Beach" during the years it was not generating a profit because there existed a reasonable likelihood that it would become profitable in the future.

9. If Ms. Stratford had been employed at Joe's during its seven-month operating season, she would have had the opportunity to engage in off-season employment. The court finds that she would have utilized this opportunity to earn a minimum of three thousand dollars during each of the five-month off-season periods.[10]

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[10] To reach a final calculation on damages, one must subtract actual earnings from the amount that would have been earned had the defendant employer not engaged in discriminatory conduct. *See, e.g., Darnell v. City of Jasper,* 730 F.2d 653 (11th Cir. 1984). At the trial on damages, Joe's argued that this formula requires the court to subtract what each claimant actually earned during a twelve-month period from the sum that each claimant would have earned during a seven-month season at Joe's. The EEOC disagreed, contending that, to "balance the equation," a reasonable figure for off-season income should be added to Joe's seven-month income figure. To support this contention, the EEOC offered expert testimony suggesting that $5,000 should be imputed as off-season income for each claimant. *See* Pl.'s Ex. 15. Indeed, the EEOC's expert noted that the $5,000 figure originated with Dr. McClave, Joe's expert, and was used by Joe's during the liability trial

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10. A comparison of Ms. Stratford's actual earnings with what she would have earned at Joe's, *i.e.*, salary and tips, fringe benefits, and imputed off-season income, shows that she incurred the following deficiencies: 1990 (Oct. 15th-Dec. 31st): $334; 1991: ($2,276);[11] 1992: $5,683; 1993: $14,333; 1994: $24,584; and 1995: $26,215. Thus, had Ms.

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when the restaurant claimed that its servers earned between $25,000 and $50,000 a year. L.Tr. 2355. In view of the five-month difference between the two work periods, the court concludes that an adjustment is required. Two options suggest themselves. First, a reasonable figure for off-season income could be imputed to a claimant who demonstrated a willingness to pursue such employment. Second, a claimant's actual twelve-month's earnings could be reduced by five-twelfths, thus ensuring that seven months of actual earnings would be subtracted from seven months of Joe's earnings. To evaluate these approaches, the court performed both calculations and found that the latter often generated sums in excess of the EEOC's $5,000 figure. While these numbers are valid as verifiable earned income, they are derived from regular full-time employment and, therefore, almost certainly overstate what could be earned from temporary off-season employment. Accordingly, the court concludes that the better approach is to start with the sum earned during Joe's seven-month season, add a reasonable amount for imputed off-season earnings and subtract the claimant's actual twelve-month's earnings. In determining an amount to be imputed for off-season earnings, the court considered multiple factors, *viz.*, the duration of the off-season (five months), the claimant's level of experience, work history and demonstrated earning capacity, and the amount actually earned by the claimant from full-time employment during the off-season.

[11] A figure in parentheses indicates an amount earned by a claimant which exceeds the amount that a server at Joe's would have earned in the same period. In other words, the claimant earned more money in this period than she would have earned at Joe's. An amount in parentheses, therefore, is not included in the computation of a back pay award. "[B]ecause a discriminatee has a duty to minimize damages and because alternative employment opportunities will sometimes prove more economically rewarding than the position sought, back pay awards are limited to proven economic loss." *Darnell,* 730 F.2d at 656.

Stratford not been the victim of sex discrimination, she would have earned $71,149 more than she actually earned.

Raquel Munoz

11. Raquel Munoz intended to apply for work at Joe's long before the October 1989 roll call. She was dissuaded from applying, however, when she became aware of Joe's reputation for not hiring female food servers. L.Tr. 583-87 and 595-99. Based upon Ms. Munoz's testimony regarding her qualifications as a food server[12] and upon the testimony offered by Joe's regarding the criteria used in hiring food servers,[13] the court finds that Ms. Munoz was fully qualified in 1989 to work as a food server at Joe's. If Ms. Munoz had applied and been hired in October of 1989, she would have continued to work at Joe's through 1996.[14]

12. In 1991, Ms. Munoz learned that Joe's was under investigation for discriminating against female applicants for food server positions. Therefore, she attended the October 1991 roll call and was interviewed for a food server's position. Ms. Munoz was fully qualified for the

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[12] *See generally* L.Tr. 571-602. Specific examples of Ms. Munoz's relevant experience include: approximately 15 years of wait staff experience at the time of her application for employment at Joe's, L.Tr. 573, including experience at a large establishment, L.Tr. 579, "head waitress" experience at an "upscale" establishment with "elegant" clientele, L.Tr. 595, 581, and experience carrying large trays, containing as many as 11 plates, L.Tr. 582.

[13] *See supra,* n.7.

[14] *See supra,* n.8.

position[15] but was not selected because the hiring panel engaged in sex discrimination.

13. Ms. Munoz actually earned these amounts: 1989 (Oct. 15th-Dec. 31st): $3,625; 1990: $7,068; 1991: $17,004; 1992: $25,645; 1993: $25,015; 1994: $19,235; 1995: $21,586; and 1996: $16,842. *See* Pl.'s Exs. 9 and 32(b).

14. If Ms. Munoz had been employed at Joe's during its seven-month operating season, she would have had the opportunity to engage in off-season employment. The court finds that Ms. Munoz would have utilized this opportunity in all years except 1990, and would have earned a minimum of three thousand dollars during each of the five-month off-season periods. In 1990, Ms. Munoz refrained from working from May through September because of a difficult pregnancy. She returned to work shortly after the birth of her son. D.Tr. 147.

15. A comparison of Ms. Munoz's actual earnings with what she would have earned at Joe's, *i.e.*, salary and tips, fringe benefits, and imputed off-season income, shows that she incurred the following deficiencies: 1989 (Oct. 15th-Dec. 31st): $627; 1990: $7,082; 1991: $3,094; 1992: ($1,462); 1993: $1,318; 1994: $5,349; 1995: $4,629; and 1996: $13,758. Thus, had Ms. Munoz not been the victim of sex discrimination, she would have earned $35,230 more than she actually earned.

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[15] *See supra,* n.12.

Carol Coyle

16. Carol Coyle worked as a food server at the Diplomat Hotel in Hollywood, Florida from 1971 until 1991. Sometime in the fall of 1991, she went to Joe's and was interviewed in a "mini-roll call," a process in which a small group of people, (in this instance about twelve), were interviewed by a three-person panel. During this process, Ms. Coyle took and passed the mandatory tray test. In making this finding, the court notes a conflict in the evidence on when the tray test was first administered. Dennis Sutton, Joe's assistant maitre d' and a member of the interview panel, initially said it was given first in "'91, I think." L.Tr. 1422. Later, Mr. Sutton suggested that the test may have been given first in 1992. L.Tr. 1711-12. Ms. Coyle, on the other hand, testified that she took the tray test in 1991. D.Tr. 178-80 and 197-201. There is also a conflict in testimony regarding when Joe's held the first mini-roll call. Anthony Arneson, Joe's lunchtime maitre d', testified that it occurred in February of 1993, D.Tr. 1885, whereas Ms. Coyle testified that one took place in 1991. Based upon the court's ability to observe the demeanor of the witnesses and to consider other criteria for judging their credibility, the court finds Ms. Coyle's testimony to be credible and worthy of belief. Based upon Ms. Coyle's testimony regarding her qualifications as a food server[16] and upon the testimony offered by Joe's regarding the

[16] *See generally* L.Tr. 637-72. Specific examples of Ms. Coyle's relevant experience include: approximately 20 years of wait staff experience at the time she applied at Joe's, L.Tr. 639, including "tuxedo" and "single service" experience at an establishment with a capacity in excess of 300 persons, L.Tr. 640-41. Ms. Coyle's experience also included carrying stacks of up to 6 covered plates. L.Tr. 640, 642.

criteria used in hiring food servers,[17] the court finds that Ms. Coyle was fully qualified in 1991 to work as a food server at Joe's, however she was not selected because the hiring panel engaged in sex discrimination. If Ms. Coyle had been hired by Joe's in 1991, she would have continued in this employment through 1995.[18]

17. Ms. Coyle actually earned these amounts: 1991 (Oct. 15th-Dec. 31st): $3,484; 1992: $20,900; 1993: $20,900; 1994: $22,400; and 1995: $22,400.

18. If Ms. Coyle had been employed at Joe's during its seven-month operating season, she would have gained temporary employment in the off-season, earning a minimum of three thousand dollars in each of the five-month periods.

19. A comparison of Ms. Coyle's actual earnings with what she would have earned at Joe's, *i.e.*, salary and tips, fringe benefits and imputed off-season income, shows that she incurred the following deficiencies: 1991: ($664); 1992: $3,881; 1993: $5,433; 1994: $2,184; and 1995: $3,815. Thus, had Ms. Coyle not been the victim of sex discrimination, she would have earned $15,313 more than she actually earned.

Dawn Keon

20. Dawn Keon stopped at Joe's twice in the fall of 1991 and completed an application for a food server's

[17] *See supra*, n.7.

[18] *See supra*, n.8.

position. However, she did not attend the October 1991 roll call nor those held in subsequent years. Ms. Keon left Miami Beach in 1992 and moved to Broward County. After evaluating the evidence, the court finds that Ms. Keon failed to prove that she was a victim of sex discrimination. Her testimony that she became aware of Joe's reputation for not hiring female food servers is credible. Nonetheless, the court finds that she was not dissuaded by this information from reapplying at Joe's. She left Miami Beach for reasons unconnected with her failure to obtain employment at Joe's. Finally, based upon a review of Ms. Keon's work experience, the court finds that she failed to establish that she was fully qualified to perform the requirements of a food server at Joe's. Accordingly, Ms. Keon is not entitled to an award of money damages.

Teresa Romanello

21. As early as 1987, Teresa Romanello learned from multiple sources that Joe's did not hire female food servers. She desired to work at Joe's but was dissuaded from applying because of Joe's reputation. L.Tr. 217-23 and 280-81. Based upon Ms. Romanello's testimony regarding her qualifications as a food server[19] and upon the testimony offered by Joe's regarding the criteria used in hiring food servers,[20] the court finds that Ms. Romanello was fully

[19] *See generally* L.Tr. 199-302. Specific examples of Ms. Romanello's relevant experience include approximately 13 to 14 years of wait staff experience at the time she applied for a position at Joe's, L.Tr. 216-17, including approximately four years of experience at an elegant and large establishment, featuring "single service" where members of the wait staff carried trays weighing up to 50 pounds, L.Tr. 211-13.

[20] *See supra,* n.7.

qualified in 1989 to work as a food server at Joe's. If she had applied and been hired in October of 1989, Ms. Romanello would have worked at Joe's through 1996.[21]

22. Ms. Romanello attended the October 1993 roll call and was interviewed for a food server's position. Although fully qualified to work at Joe's, she was not selected because Joe's hiring personnel engaged in sex discrimination and gave her a lower rating than she deserved.

23. Ms. Romanello actually earned these amounts: 1989 (Oct. 15th-Dec. 31st): $3,979; 1990: $19,500; 1991: $19,500; 1992: $19,500; 1993: $20,000; 1994: $20,000; 1995: $20,500; and 1996: $17,000.

24. If Ms. Romanello had been employed at Joe's during its seven-month operating season, she would have had the opportunity to engage in off-season employment. The court finds that she would have utilized this opportunity and earned a minimum of three thousand dollars during each five-month period except for 1996.[22]

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[21] *See supra,* n.8.

[22] Ms. Romanello testified that when the Sea Shanty, a restaurant she had worked at since 1986, closed on June 5th, 1996, she decided to take some time off. She cited the normal summer slow down and the fact that her husband had won $20,000 in the lottery. D.Tr. 429,-439 and 468. Thus, she removed herself from the workforce for five months. To account for this, the court has not imputed off-season income for 1996. The court, however, has declined to follow Joe's suggestion that Ms. Romanello's husband's lottery winnings should be attributed to her as earnings. *See* Def.'s Ex. 37 and D.Tr. 1761-65. Assuming that lottery winnings are marital property in which each spouse possesses an equitable interest, *see, e.g., In re Fordu,* 209 B.R. 854 (B.A.P. 6th Cir. 1997); *Panganiban v. Panganiban,* 1998 WL 40484, *10-12 (Conn.

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25. A comparison of Ms. Romanello's actual earnings with those that she would have earned at Joe's, *i.e.*, salary and tips, fringe benefits and imputed off-season income, reveals the following: 1989 (October 15th through December 31st): ($981); 1990: ($2,350); 1991: $598; 1992: $4,683; 1993: $6,333; 1994: $4,584; 1995: $5,715; and 1996: $10,600. Thus, had Ms. Romanello not been the victim of sex discrimination, she would have earned $32,513 more than she actually earned.

Injunctive Relief

26. Joe's has taken some steps to eradicate sex discrimination from its hiring practices. For example, when first confronted with the allegations in this case, management substituted a three-person hiring panel for the previous single decision maker. Equally significant, the restaurant began to hire female food servers. At the same time, Joe's resisted the EEOC's request to advertise annual roll calls. This was especially important given Joe's reputation in the food serving community for discriminating against women. Furthermore, the restaurant adamantly refused to engage in a voluntary effort to add

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Super.); *Seizer v. Sessions,* 940 P.2d 261 (Wash. 1997); *In re Marriage of Palacios,* 656 N.E.2d 107, 113 (Ill. App. Ct. 1995), *appeal denied,* 662 N.E.2d 427 (Ill. 1996), there is no justification for attributing the entire sum to the wife. More to the point, it is improper to characterize lottery winnings as earnings for purposes of back pay calculations. Under the collateral source doctrine, funds unrelated to the conduct at issue and received from third parties are not counted as mitigating earnings. *See, e.g., NLRB v. Gullett Gin Co.,* 340 U.S. 361, 364, 71 S.Ct. 337, 339, 95 L.Ed.2d 337 (1951) (court need not reduce back pay award by deducting state unemployment compensation benefits).

greater definition to the four criteria it used to select food servers. *See* Dckt. Entry 167. The court repeatedly voiced its concern that these criteria, *viz.*, appearance, articulation, attitude and experience, were too vague to provide adequate direction to the hiring staff and, therefore, played a role in the discrimination that occurred. Joe's yielded on this point only when the court threatened to prevent the restaurant from hiring additional servers until the hiring criteria were defined. *See* Dckt. Entry 190. In October 1997, at the court's insistence, Joe's instituted formal training for members of the interview panel and utilized a newly-developed server evaluation form. An evidentiary hearing and court order were required to force the restaurant to advertise the 1997 roll call. Joe's position throughout the litigation has been one of "combative denial." In light of the evidence produced,[23] and given the

[23] During the trial on damages and injunctive relief, the EEOC placed into evidence a two-inch black-and-yellow campaign button that Joe's management distributed to its serving staff in 1997. It states, "JOE'S STAFF, I AM GOVERNMENT APPROVED." *See* Pl.'s Ex. 31. Noting that the necessity for injunctive relief remained a contested issue, the EEOC argued that it was entitled to introduce evidence that provided insight into management's state of mind. As seen by the EEOC, management's action of distributing buttons to male servers who had been hired when Joe's discriminated against women demonstrated management's insensitivity to the serious issues in this case and evidenced its disdain for court-ordered remedial measures. Anticipating the EEOC's offer, Joe's filed a pre-trial motion to exclude any reference to the buttons. Counsel for the restaurant argued that campaign buttons are classic examples of free speech protected by the First Amendment. Joe's counsel further contended that the First Amendment shielded the statements and expressive conduct from criticism by the EEOC and from consideration by the court. No one can take issue with Joe's first premise; campaign buttons do enjoy First Amendment protection. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d

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contentious history of this case, the court finds that the EEOC has established the necessity for mandatory injunctive relief. Joe's, on the other hand, has failed to demonstrate that, absent the strictures of a mandatory injunction, it can be relied upon to refrain from discriminatory conduct. Therefore, the court will enter a mandatory injunction governing Joe's employment practices and hiring decisions until January 1, 2001. This period is shorter than requested by the EEOC but, in the court's judgment, is of sufficient duration to allow remedial measures to take root.

Based on the foregoing, the court reaches the following:

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487 (1995). But the suggestion that the First Amendment provides justification to suppress criticism is truly extraordinary. Indeed, Joe's formulation is antithetical to the core values of the First Amendment. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market. . . . " *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969). It has long been recognized that a party in a civil proceeding may introduce into evidence statements and assertive conduct of an adverse party. *See* Fed. R. Evid. 801(d)(2)(A); *see also Bondie v. Bic Corp.,* 947 F.2d 1531 (6th Cir. 1991). While it is axiomatic that a party may not be punished for having engaged in protected speech, a court is free to consider a party's speech if relevant to an issue in litigation. *See, e.g., United States v. Rosenberg,* 806 F.2d 1169 (3rd Cir. 1986), *cert. denied,* 481 U.S. 1070, 107 S.Ct. 2465, 95 L.Ed.2d 873 (1987). In the case at bar, the meaning of Joe's action of distributing campaign buttons is ambiguous. It is the court's view that the most plausible interpretation is that Joe's was putting a tongue-in-cheek publicity spin on what has been a difficult situation for a restaurant that is conscious of its public image. Accordingly, the court attaches no weight to this act in determining the necessity for future injunctive relief.

CONCLUSIONS OF LAW

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e-2(a)(1) provides that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." The aim of this legislation is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees." *Albemarle Paper Company v. Moody,* 422 U.S. 405, 417-18, 95 S.Ct. 2362, 2371-72, 45 L.Ed.2d 280 (1975) (citing *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-30, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971)). As one method of enforcement, Congress bestowed upon the courts the power to award damages "as part of a complex legislative design directed at an historic evil of national proportions." *Id.* at 416. The aim of a Title VII damages award is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* at 418. Accordingly, a broad range of remedies is available to the court in fashioning a damages award.

One component of a Title VII damage award is back pay, *i.e.,* the compensation that the plaintiff would have received from the employer had the discrimination not occurred. A prevailing plaintiff in a Title VII action is presumptively entitled to back pay. *Nord v. United States Steel Corp.,* 758 F.2d 1462, 1472 (11th Cir. 1985); *see also Weaver v. Casa Gallardo, Inc.,* 922 F.2d 1515, 1526 (11th Cir. 1991). Two overarching principles guide the computation of a back pay award: "(1) unrealistic exactitude is not

required, [and] (2) uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer." *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 260-61 (5th Cir. 1974) (citing *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 n.53 (5th Cir. 1974)). A district court may deny back pay only for reasons which are consistent with the central statutory purposes of Title VII noted above. *Albemarle Paper Co.*, 422 U.S. at 421, 95 S.Ct. at 2373. The fact that an employer may have lacked specific intent to discriminate, or, put differently, was acting in good faith, is not a defense to a back pay award. *Pettway*, 494 F.2d at 253.

Selecting the appropriate starting date is a critical decision in calculating back pay. The traditional rule is that back pay liability begins to accrue on the date of the discriminatory act, *see Velazquez v. Chardon*, 736 F.2d 831 (1st Cir. 1984), but not earlier than two years prior to the filing of the charge of discrimination. *See* 42 U.S.C. § 2000e-5(g)(1). Thus, for example, in the case of an employee terminated because of illegal discrimination, the date of termination serves as the starting date to calculate back pay. *See, e.g., EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1509 (9th Cir. 1989). A different rule applies, however, when a qualified employee was deterred from applying for employment because of the employer's reputation for engaging in discriminatory employment practices. The Supreme Court spoke to this issue in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), and said:

> A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject

> themselves to the humiliation of explicit and certain rejection.
>
> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices – by his consistent discriminatory treatment of actual applicants, by the manner in which he publicized vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

Id. at 365-66, 97 S.Ct. at 1870.

In the case at bar, Catherine Stratford, Raquel Munoz and Teresa Romanello are each entitled to the benefit of this rule. Each of these claimants was deterred from applying for a food server's position at Joe's by the restaurant's reputation for discriminating against women. The court has found that each of these applicants was fully qualified to work at Joe's and would have applied but for the knowledge of Joe's reputation. Under the rule announced in *Teamsters,* these applicants were not obliged to engage in the futile gesture of applying for a food server's position at Joe's when the restaurant was known to adhere

to a policy of not hiring women. Consequently, an award of back pay for each of these applicants must be calculated from the date on which they were first deterred from applying at Joe's because of its reputation.[24]

Back pay damages normally are awarded through the date of judgment. *Nord,* 758 F.2d at 1473. The case at bar, however, presents an exception to the general rule. Here, the court has found that each of the claimants would have voluntarily terminated her employment at Joe's prior to the date of judgment. Therefore, the date of termination is

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[24] The court discussed the rationale for admitting evidence of Joe's reputation in its opinion on liability. *See EEOC v. Joe's Stone Crab, Inc.,* 969 F. Supp. at 736. An additional brief comment, however, is in order. A predecessor judge announced his intention to bifurcate the trial, treating liability first and then, if necessary, damages. *See* Dckt. Entry 49, Status Conf. Hr'g Tr. at 7. Joe's was represented at the status conference and, in the pretrial stipulation, indicated its lack of objection to this procedure. *See* Dckt. Entry 98. During the trial on liability, when the EEOC offered testimony regarding Joe's reputation, Joe's counsel objected, citing "hearsay." L.Tr. 1728. The court overruled this objection, noting that the evidence was not being admitted to prove the charge of discrimination, but only to establish that Joe's had a reputation in the food servers' community for not hiring female food servers. Following the liability trial, the court entered an order finding that the evidence on discrimination, which was separate and apart from the evidence about reputation, proved that Joe's discriminated against women. Thus, the evidence in the liability phase consisted of two components. One established that Joe's discriminated against women. The other proved that restaurant workers in the Miami area were well aware of Joe's discriminatory practices. During the subsequent trial on damages, Joe's attempted to offer evidence to rebut the previously-admitted reputation evidence. The court sustained the EEOC's objection, finding that the liability phase was over, that Joe's had waited too long and that the testimony was not relevant to the issue of damages. The court, however, did allow Joe's to offer evidence about its present reputation, finding it relevant to the issue of whether further injunctive relief was necessary.

the appropriate end point for calculating a back pay award. "Title VII should not put the prevailing claimant in a better position than similar employees who were not discriminated against, but conversely [she] should not be disadvantaged." *Weaver,* 922 F.2d at 1527. Put another way, a Title VII damage award should make the claimant whole, not confer a windfall. When the evidence establishes that a claimant would have terminated her employment voluntarily prior to the date of judgment, the earlier date must be used for back pay calculations. In circumstances such as these, " '[t]he court must 'do its best to recreate the conditions and relationships that would have existed if the unlawful discrimination had not occurred.' " *EEOC v. Ilona of Hungary, Inc.,* 108 F.3d 1569, 1580 (7th Cir. 1997) (reversing back pay award where evidence showed that employee intended to quit her job before she was illegally terminated) (quoting *United States v. City of Chicago,* 853 F.2d 572, 575 (7th Cir. 1988)).

Back pay encompasses more than salary and tips. Fringe benefits such as vacation, sick pay, insurance and retirement benefits are included as well. *Pettway,* 494 F.2d at 263; *see also Crabtree v. Baptist Hosp. of Gadsden, Inc.,* 749 F.2d 1501 (11th Cir. 1985). Because Joe's provided health insurance and profit sharing, which have been valued in paragraph 3, *supra,* these sums are properly included as part of each claimant's back pay award.

As previously noted, an award of back pay is intended to make the claimant whole, not to confer a windfall. To this end, Title VII provides: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g)(1). Thus, in calculating a back pay award, the trial court must

determine what the employee would have earned had she not been the victim of discrimination, and must subtract from this figure the amount of actual interim earnings. Moreover, this calculation must be performed according to a quarterly earnings formula which has gained court approval. *See Darnell v. City of Jasper,* 730 F.2d 653, 656-57 (11th Cir. 1984). The totals reflected in ¶¶ 10, 15, 19 and 25 have been computed in accordance with this approach.

To be eligible for a back pay award, a claimant must mitigate her damages by seeking employment "substantially equivalent" to the position she was denied. *Weaver,* 922 F.2d at 1527. " 'Substantially equivalent employment' is employment that affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status to those available to employees holding the position from which the Title VII claimant has been discriminatorily terminated. If the former employee cannot find substantially equivalent employment, [she] may 'lower [her] sights' and accept noncomparable employment." *Id.*

While every claimant has a duty to exercise reasonable diligence in attempting to mitigate damages, the defendant has the burden of proving that a claimant has failed to discharge her duty. *See Smith v. Great Am. Restaurants, Inc.,* 969 F.2d 430, 438 (7th Cir. 1992). Thus, a defendant must show that a claimant did not make reasonable efforts to obtain comparable work, or that comparable work was available and the claimant did not seek it out. *Sellers v. Delgado Community College,* 839 F.2d 1132, 1139 (5th Cir. 1988). Joe's attempted to satisfy this burden by contending that Catherine Stratford's decision to become self-employed by opening a restaurant

did not constitute a reasonable effort to obtain comparable work. Case law, however, suggests that a claimant's decision to become self-employed may constitute reasonable diligence for purposes of the back pay determination. *See, e.g., Nord,* 758 F.2d at 1471 (finding it reasonable for plaintiff to turn her attention to setting up a business with her husband after searching unsuccessfully for employment); *Smith,* 969 F.2d at 438 ("The notion that starting one's own business cannot constitute comparable employment for mitigation purposes not only lacks support in the cases, but has a distinctly un-American ring."); *Carden v. Westinghouse Elec. Corp.,* 850 F.2d 996, 1005 (3d Cir. 1988) (plaintiff's choice to start his own business was reasonable method to mitigate damages); and *Taylor v. Central Pa. Drug and Alcohol Servs. Corp.,* 890 F. Supp. 360, 372-73 (M.D. Pa. 1995) (effort to mitigate back pay damages by starting own business was laudable effort and did not constitute voluntary withdrawal from labor market).

A self-employed person is "employed" for the purposes of mitigating damages if establishing a business of his own was a reasonable alternative to finding other comparable employment. *Carden,* 850 F.2d at 1005. The claimant's duty to mitigate does not require success, but only "an honest, good faith effort." *Smith,* 969 F.2d at 438. In *Smith,* for example, a discharged plaintiff initially sought employment through an agency and newspaper listings. Within a short time – approximately a week – she began planning her own restaurant enterprise. In the final analysis, Smith's restaurant did not show a net profit until its third year, but its gross revenues were increasing. Smith's efforts in opening and operating her restaurant "were serious and in fact much *greater* than required by an ordinary full-time job." *Id.* (emphasis in original). The jury

awarded Smith back pay for thirty-four months. In affirming the jury's verdict, the Court of Appeals stated:

> Given that Smith's decision to open her own restaurant was a reasonable effort at alternative employment, we must ask whether such self-employment remained reasonable for the entire period covered by the jury's award. The [statute] must not be used as a tool for insuring a plaintiff's fledgling business while it continues to sustain losses. Damages should ordinarily extend only to the date upon with [sic] 'the sting of any discriminatory conduct [has] ended.'

Id. at 438-39 (citation omitted). Thus, unprofitability during the initial stages of operation will not, by itself, establish that the enterprise was an unreasonable method of mitigating damages. *See also Nord,* 758 F.2d at 1472 (claimant entitled to back pay for six to eight months spent initiating own business without remuneration).

The burden to prove that the claimant's decision to open her own business was not a reasonable method of mitigating damages falls on the defendant. *Carden,* 850 F.2d at 1005. In the case at bar, Joe's failed to sustain this burden. It proved only that Ms. Stratford's business ultimately failed. Accordingly, as noted in paragraph 8, *supra,* the court concludes that Catherine Stratford satisfactorily established that she reasonably attempted to mitigate her damages by starting her own business.

"Title VII authorizes prejudgment interest as part of the backpay remedy. . . . The backpay award authorized by [Title VII] is a manifestation of Congress' intent to make persons whole for injuries suffered through past discrimination. Prejudgment interest, of course, is an element of complete compensation." *Loeffler v. Frank,* 486 U.S. 549,

558-59, 108 S.Ct. 1965, 1970-71, 100 L.Ed.2d 549 (1988) (internal quotation marks and citations omitted); *see also EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507 (11th Cir. 1987); *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931 (1st Cir. 1995). An award of prejudgment interest adjusts the back pay award for inflation and reflects the present day value of income that should have been paid to the claimant in the past. To determine the appropriate interest rate, courts have traditionally turned to the National Labor Relations Act (NLRA) for guidance. *See e.g., Brown v. A.J. Gerrard Mfg. Co.*, 715 F.2d 1549 (11th Cir. 1983) (en banc) (per curiam). Under the NLRA there has been a consistent practice of awarding prejudgment interest on back pay awards. Furthermore, in 1977, the National Labor Relations Board adopted the Internal Revenue Service's (IRS) prime rates and rejected the traditional flat six percent interest rate. The Eleventh Circuit has held that the IRS prime rates are to be used to calculate the amount of prejudgment interest on back pay awards in Title VII cases. *See Guardian Pools, Inc.*, 828 F.2d at 1512. Accordingly, in the exercise of its discretion, the court concludes that each of the claimants is entitled to prejudgment interest on their back pay award, and the court shall reserve jurisdiction to receive additional evidence on the calculation of prejudgment interest. *See, e.g., Taylor,* 890 F. Supp. at 369 (citing *Guardian Pools* and approving adoption of IRS overpayment rates pursuant to 26 U.S.C. § 6621(a)(1) as better reflecting lost investment opportunities).

A prevailing plaintiff in a Title VII action is also presumptively entitled to reinstatement or, if that is impracticable, front pay in lieu of reinstatement. *See Nord,* 758 F.2d at 1473 (district court must set forth

circumstances warranting denial of reinstatement or front pay) and *Weaver,* 922 F.2d at 1528. Because a monetary award of front pay is calculated to end on the date that the discrimination victim attains the position she would have been in but for the discrimination, front pay is appropriate only when the other damages awarded do not fully compensate the plaintiff. *Weaver,* 922 F.2d at 1529. Inasmuch as the court previously determined that each of the claimants in the case at bar would have voluntarily terminated her employment at Joe's prior to the date of the entry of final judgment, neither reinstatement nor front pay is warranted.

The Supreme Court has ruled that back pay awards are taxable under the Internal Revenue Code. *United States v. Burke,* 504 U.S. 229, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992). Consequently, a district court, in the exercise of its discretion, may include a tax component in a lump sum back pay award to compensate prevailing Title VII plaintiffs. *Sears v. Atchison, Topeka & Santa Fe Ry.,* 749 F.2d 1451, 1456 (10th Cir. 1984) (particularly appropriate where protracted litigation was involved). This accords with a prevailing practice in the settlement of Title VII suits which commonly include an amount to offset the plaintiff/taxpayer's increased liability. In the case at bar, however, the EEOC failed to provide sufficient competent foundation evidence to permit the court to make these calculations. Therefore, the court declines to award money damages to offset whatever increased tax liability a claimant will experience by receiving a lump sum award.

Where discrimination in violation of Title VII occurs, the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like

discrimination in the future." *Louisiana v. United States,* 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965). *Albemarle Paper Co.,* 422 U.S. at 418, 95 S.Ct. at 2372. Toward the end of preventing past discrimination from recurring, victims of employment discrimination are generally entitled to an injunction against future discrimination. The exception to this general rule is when the employer proves that it is unlikely to repeat the discriminatory practice or practices. *See, e.g., Hacienda Hotel,* 881 F.2d at 1519. An employer that undertakes curative steps only after it has been sued for its discriminatory conduct does not thereby "provide sufficient assurances that it will not repeat the violation to justify denying an injunction." *EEOC v. Goodyear Aerospace Corp.,* 813 F.2d 1539, 1544 (9th Cir. 1987).

DECRETAL PROVISIONS

Accordingly, it is **ORDERED**, **ADJUDGED** and **DECREED** that:

(1) Upon conclusion of the hearing to determine the amount of prejudgment interest, a final judgment will be entered in favor of Catherine Stratford and against Joe's Stone Crab, Inc. for the sum of $71,149 plus prejudgment interest.

(2) Upon conclusion of the hearing to determine the amount of prejudgment interest, a final judgment will be entered in favor [sic] Raquel Munoz and against Joe's Stone Crab, Inc. for the sum of $35,230 plus prejudgment interest.

(3) Upon conclusion of the hearing to determine the amount of prejudgment interest, a final judgment will be

entered in favor of Carol Coyle and against Joe's Stone Crab, Inc. for the sum of $15,313 plus prejudgment interest.

(4) Upon conclusion of the hearing to determine the amount of prejudgment interest, a final judgment will be entered in favor of Teresa Romanello and against Joe's Stone Crab, Inc. for the sum of $32,513.

(5) Upon the filing of this memorandum opinion, and pursuant to Rule 58, Fed.R.Civ.P., the clerk shall enter final judgment in favor of the EEOC and against Joe's Stone Crab, Inc., permanently enjoining Joe's Stone Crab, Inc. from discriminating against female applicants for food server positions. To this end, Joe's Stone Crab, Inc. is further ordered to implement and adhere to these requirements:

> (A) Within twenty days of the entry of this order, the directors of Joe's Stone Crab, Inc., shall convene a formal meeting and adopt a corporate resolution indicating that Joe's is an equal opportunity employer and shall conduct its hiring practices in accord with the requirements of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1). While the resolution may indicate Joe's corporate employment policy of not discriminating on the basis of race, color, religion, sex, or national origin, it shall expressly state Joe's policy of not discriminating on the basis of sex in the hiring of food servers.
>
> (B) An authenticated copy of the corporate resolution shall be filed with the clerk of court and provided to the EEOC within five days of its adoption.

(C) The corporation's policy shall be communicated orally and in writing to all subordinates involved in the process of hiring food servers.

(D) The corporation's policy shall be announced by management during the opening remarks at the annual roll call.

(E) For the period between the date of the entry of this order and January 1, 2001, Joe's shall follow the practices and procedures that were ordered by this court for the conduct of the October 1997 roll call. During the period between the date of the entry of this order and January 1, 2001, Joe's shall not alter the method by which it evaluates and hires applicants for food server positions without obtaining prior approval of this court.

(F) Until January 1, 2001, Joe's shall inform all individuals selected by the restaurant for a food server's position that the offer of employment is deemed conditional and shall not be final unless and until this court approves the report submitted by the court-appointed monitor.

(G) Upon the entry of this order, Joe's shall authorize and bear the costs associated with the completion of a criterion-related validation study of the evaluation criteria used to select and hire food servers. This study shall be conducted by an industrial psychologist and shall be completed within thirty months of the entry of this order. A copy of the study and its results shall be filed with the court, and provided to the EEOC.

(H) The roll calls to be conducted in 1998, 1999, and 2000 shall conform with the following requirements:

(i) Roll calls shall be advertised in the Miami Herald and the Sun-Sentinel in the Friday, Saturday and Sunday editions on the two weekends preceding the roll call. They shall be advertised in the New Times, a weekly publication, during the two weeks immediately preceding the roll call. The content, size of the overall advertisement, and size of the print in the advertisement shall be the same as that introduced into evidence in this case. *See* Def. Ex. 28.

(ii) For the two-week period in which the advertisements appear in the press, Joe's shall maintain a recorded call-in information line. The information provided in the recorded message shall be filed with the court and provided to the EEOC.

(iii) Joe's interview panel shall consist of at least three persons. Prior to the day of roll call, the members of the interview panel and designated alternates shall participate in a training session conduced by Dr. Karl Galen Kroeck, or a substitute industrial psychologist. Each training session, which shall last a minimum of four hours, shall utilize the server interview training manual and server interview evaluation form developed by Dr. Kroeck. In addition, each session shall include mock interviews with live applicants.

(iv) The restaurant entrance to be used by applicants at the roll call shall

be marked clearly and other entrances shall be marked to direct applicants to the proper door.

(v) By 8:00 a.m. on the day of the roll call, Joe's shall post a sign-up sheet outside the appropriate entrance. After applicants have been admitted to the restaurant, and following management's introductory comments, applicants shall be interviewed in the order in which they arrived and signed-in. Only applicants who arrived before the delivery of the management's introductory comments shall be entitled to be interviewed. Applicants not present when called for an interview shall not be entitled to a later interview.

(vi) Joe's may decline to interview any applicant who does not qualify for employment pursuant to Joe's corporate policy, *e.g.*, a recently discharged employee.

(vii) All applicants shall be required to take and pass a standardized tray test. Applicants who pass the tray test shall be interviewed by the three-person panel. Each panel member interviewing and evaluating applicants for food server positions shall utilize the server interview training manual and the server interview evaluation form developed by Dr. Kroeck. *See* Def.'s Ex. 33.

(viii) In addition to other requirements established by law, Joe's shall retain all applications, scoring sheets and

other documentation used during the hiring process. Joe's shall make this documentation available to the EEOC for inspection and copying within seventy-two hours of the completion of the roll call.

(ix) A court-appointed monitor shall attend the roll calls. The monitor shall be appointed in a separate order and shall be compensated by Joe's pursuant to the terms of the court's order. Within five days of the completion of the roll call, the monitor shall file a written report indicating the total number of applicants interviewed, their gender, the total number of servers selected by Joe's, and their gender. A copy of the report shall be provided to each party at the time of filing. Each party shall have ten days from the receipt of the report to file objections to the practices, procedures and hiring decisions reached at the roll call. No decision reached at the roll call shall be deemed final until the court has ruled upon objections following the monitor's report. If necessary, the court will conduct a hearing on these issues.

(x) The EEOC shall be entitled to have up to two observers present at the roll calls.

(6) The court shall reserve jurisdiction over the cause and the parties to enforce the terms and conditions of injunctive relief, and to assess costs in favor of the EEOC.

DONE and SIGNED in Chambers at West Palm Beach, Florida, this 12th day of August, 1998.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
U.S. District Judge

Copies provided to:

Gedety N. Serralta, Esq.
Robert D. Soloff, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

CASE NO.: 93-1082-CIV-HURLEY

JOE'S STONE CRAB, INC.,

Defendant.

PARTIAL FINAL JUDGMENT FINDING JOE'S STONE CRAB, INC. GUILTY OF SEX DISCRIMINATION

THIS CASE, tried to the court, involves allegations of sex discrimination in the hiring of food servers at a Miami Beach restaurant. The plaintiff, Equal Employment Opportunity Commission (EEOC), contends that the defendant, Joe's Stone Crab, Inc., the owner and operator of Joe's Stone Crab Restaurant (Joe's or "the restaurant"), intentionally discriminates against women by refusing to hire them for food server positions in violation of § 703 of Title VII of the Civil Rights Act of 1964, as amended. Alternatively, the EEOC contends that Joe's violates Title VII by using hiring practices that have a disproportionate and adverse impact upon women. Based on an evaluation of the evidence, the court finds that the EEOC has not proved intentional discrimination. It has established, however, that Joe's uses employment practices that have an illegal disproportionate impact on women. Since the law treats such disproportionate impact to be the functional equivalent of intentional discrimination, the court grants partial final judgment on liability in favor of the

plaintiff EEOC. The court also reserves jurisdiction to conduct a separate trial on damages and other affirmative and injunctive relief at a future setting.

FINDINGS OF FACT

A. General Historical Background

1. Joe's Stone Crab Restaurant is a landmark on Miami Beach. Founded in 1913, two years before the incorporation of the City of Miami Beach, Joe's opened in a small wooden bungalow where customers were served on the front porch. Today, still at the same site, Joe's occupies an enlarged facility that seats approximately 440 patrons. It consists of several dining rooms and bar areas, a kitchen, a take-out section, an office, a laundry and a multi-story parking garage. The restaurant serves up to 1450 dinners each mid-week evening during the stone crab season, which lasts from October to May. Between 1500 and 1800 dinners are served on busy weekend nights. Long lines and waiting periods are commonplace. Indeed, Joe's is so popular that patrons have been known to come directly from the airport with luggage in hand.

2. Joe's is owned by and has been under the continuous management of the same family (now the fourth generation) since the restaurant opened. From the first years, when it was literally a "mom-and-pop" operation, the restaurant gradually added staff, first with relatives and then others. By the late 1970s and early 1980s, Joe's had become a large, thriving enterprise, and consequently, the owners delegated hiring decisions to department heads. In 1985, Grace Weiss and Jesse Weiss, the daughter-in-law and son of the founders, respectively, retired and passed the managerial reins to their daughter Jo Ann.

She embarked on an ambitious program of updating the menu, expanding the restaurant and refurbishing the physical plant. Despite what she described as an "all-encompassing role," she continued the policy of delegating hiring decisions to department heads. The head waiter or maitre d' continued to have complete authority over the hiring of food servers.

3. Today, Joe's employs between 230 and 260 employees, most of whom work in departments unconnected with this litigation, *e.g.,* kitchen, laundry, shipping, take-away and cashiering. For many years, the food serving staff numbered about thirty. This figure increased to seventy when Joe's added a luncheon shift in 1979. Throughout its history, Joe's has experienced extraordinary employee loyalty and longevity. This is due, in part, to a generous benefits package which includes individual and family health coverage, dental benefits and profit sharing. Several employees compared the working atmosphere at Joe's to that of a large, caring family, and cited examples of the owners' generosity to employees in need. Grace Weiss, the former owner and manager for many years, testified that "people have worked for us for twenty, thirty, forty years -- their whole work experience." For example, Calvin Keel, the head of the kitchen department, has been at Joe's for over thirty-eight years. An expert in restaurant management testified that "[v]ery few restaurants have as low a turnover as Joe's."

4. Low turnover and the widely-recognized potential to make "good money" combine to make food server positions at Joe's scarce and coveted. Employees whose wages are largely dependent on tips benefit from the moderate to expensive bill that follows a dinner of stone crabs or other entrees plus á la carte side dishes. Compensation is

further enhanced by the busy pace at Joe's. In an industry where the norm is two and one-half table turnovers per night, Joe's regularly turns a table four to five times a night. Thus, from a food server's perspective, Joe's is a gold mine. One applicant offered this understated description: [Joe's is a] "good place to work, money's good, get summers off and you get benefits."

B. History of Male Server Tradition

5. Women have worked at Joe's throughout its history. In fact, women have predominated as owner/managers. Nonetheless, most of Joe's female employees have worked in positions traditionally viewed as "women's jobs," *e.g.*, as cashiers or laundry workers. Food servers generally have been male. For a brief period during World War II, women worked as food servers, but for the most part these positions reverted to men at the conclusion of the war. From 1950 on, the food serving staff has been almost exclusively male. Indeed, one striking exception proves the rule. Dotty Malone worked as a food server at Joe's for seventeen years, and for most of this time she was the lone female on a serving staff that ranged between twenty-four and thirty-two.

6. The evidence presented at trial does not establish that Joe's management had an express policy of excluding women from food server positions. To the contrary, the evidence portrays owner/managers who have been courageous in opposing overt discrimination. For example, Joe's was picketed for two years when the owners insisted on hiring African-American employees who had been excluded from union membership because of race. What the evidence in this case does prove is that Joe's management

acquiesced in and gave silent approbation to the notion that male food servers were preferable to female food servers. Grace Weiss hinted as much when she said:

> In spite of the fact that the restaurant has been run predominately by females (myself and my daughter) for the past 45 years, we have always had mostly male servers. We have a mixture of young and old, black, white and Oriental waiters, and occasionally female servers. I cannot explain the predominance of male servers, but perhaps it has to do with the very heavy trays to be carried, *the ambience of the restaurant* and the extremely low turnover in servers. (Emphasis supplied.)

Recent experience at Joe's, gained when the restaurant hired several female food servers after the start of the EEOC's investigation, establishes beyond a doubt that women have the physical strength to carry serving trays. Witness after witness from Joe's senior staff, including Anthony Arneson, the daytime maitre d' personally responsible for all wait staff hiring from 1987 to 1991, and night captain Dennis Sutton, who assisted him in that capacity after 1991, attested to the fact that women are capable of performing every aspect of a food server's job at Joe's.

7. With such evidence, low turnover does not explain the near total absence of women among new hires in this one sector of the restaurant's work force. Rather, Grace Weiss provided a clue to the true cause with her reference to the "ambience of the restaurant." Roy Garret, described by Joe's as its "legendary maitre d'," provided more insight when he gave this testimony:

> As I said before, we had very few female applicants over the years. It was sort of tradition. . . .

> It was always tradition from the time I arrived there that it was a male server type of job. And until just recently when we became aware that we had to do other things, . . . originally it was traditionally a male place. We always had women that were qualified women. . . . Traditionally, I mean, it's just some restaurants, when you walk in, you know there are going to be women waitresses, other restaurants you know it is going to be male waiters.

In the same vein, Joe's general manager Robert Moorehead responded to a question about the lack of female food servers by admitting that it never struck him as odd that female food servers were not being hired. Clearly, what prevailed at Joe's, albeit not mandated by written policy or verbal direction, was the ethos that female food servers were not to be hired.

8. Karen McNeil, Joe's trial expert in restaurant management, provided this historical explanation:

> It has been an attitude and standard, it comes from Europe. In all of Europe you will find in all of the grade three restaurants in Europe, there is an impression that service at that high level is the environment of men, and that it ought to be that way. And I think that that attitude a few decades ago came and was felt a little bit here in this country. . . .
>
> Those [European] opinions and those sensibilities, I think were in fact carried here by restauranteurs who hoped to create something serious. If you wanted to create a serious restaurant that would become known in the community, that would become one of the community's great restaurants, you did what

> they did in Europe, you modeled yourself after them. I don't think anybody thought about it. They said, well, men did it there. It tended to be men here, too, who had those skill sets, and so men were [sic] automatically became the labor pool.

Ms. McNeil is not alone in noting these historical antecedents. A recent newspaper article discussing the prevalence of male-only serving staffs in some of New York City's elite eating establishments cited a captain at an East Side restaurant, who explained: "There is no tradition of women working in dining rooms in Italy. The men wouldn't know how to handle the situation, especially if it meant working with American women." Frank J. Prial, *Who Says Women Can't Do This Job?,* N.Y. Times, October 23, 1996. Such notions may seem silly and antiquated when measured by today's standards of gender equality, but no one can dispute that they are deeply rooted in our cultural traditions. Take, for example, this dictum by America's ultimate arbiter of propriety and decorum: "If the servants are efficient and well trained, a small (that is, for no more than twelve) formal dinner may be beautifully handled by a cook, a butler, and a footman. The footman may be replaced by a maid, *but at a truly formal dinner, men should serve the meal.*" Elizabeth L. Post, *Emily Post's Etiquette* (12th ed., Funk & Wagnalls 1969) (emphasis supplied). Joe's sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu.

C. Joe's Employment Practices

9. Joe's conducts a "roll call" each year to recruit new servers and fill other positions. Held on the second

Tuesday in October, it is rarely advertised but is widely known throughout the local food server community. Usually, about 100 applicants attend. The evidence indicates that very few women – perhaps no more than two or three each year – attended the annual roll call from 1986 to 1990. During this five year period, the restaurant hired 108 food servers, all of whom were male. On June 17, 1991, the EEOC filed the charge instigating the investigation of Joe's hiring practices. Between July 1991 and December 1995, the restaurant hired eighty-eight new food servers, nineteen of whom were female.

10. A roll call for any given year typically runs as follows. Applicants for server positions arrive at the roll call early in the morning, complete a written application, listen to introductory remarks, and then participate in an individual interview. The applicants selected from the roll call to fill server openings trail experienced servers for three days, which time serves both as a training period and a probationary period. After successful completion of the trailing process, all new food servers start on the luncheon shift. Beginning in their second year, if successful, they migrate to the dinner shift as vacancies occur.

11. In 1986, daytime maitre d' Raymond Damiano was responsible for interviewing and hiring new servers, and dinner maitre d' Roy Garret sometimes assisted him in the interviewing. Beginning with the 1987 roll call, daytime maitre d' Anthony B. Arneson was given sole responsibility for hiring new food servers. Mr. Arneson performed this function without the guidance of written or verbal policies. Rather, he relied on what he described as his "gut feeling" in evaluating applicants from four perspectives: (1) appearance, (2) articulation, (3) attitude and (4) experience. "My decisions," he said, "were based only

on what I had to work with, the interview . . . and my professional judgment."

12. The EEOC filed its charge of discrimination in June of 1991. Thereafter, and surely in response to the EEOC's expressed interest, Mr. Arneson was directed by the management to conduct interviews in conjunction with a panel composed of assistant dinner maitre d' Dennis Sutton and general manager Robert Moorehead. In subsequent years, other employees, both male and female, served on the panel. Since 1992, each applicant has also been asked to demonstrate his or her ability to carry a loaded serving tray. Any applicant's failure to pass the tray test results in automatic disqualification because Joe's regards this ability as an indispensable job prerequisite. Based on the evidence presented and on the court's view of the restaurant in operation, the court concludes that the tray test is a legitimate indicator of an individual's ability to perform an essential component of a food server's job at Joe's.

D. Joe's Reputation in the Server Community

13. There was a widely-held belief among workers in the Miami food serving industry that Joe's would not hire women for food server positions. One witness testified, "Joe's had a reputation of being one of the best restaurant jobs to get if you were a man. As far as being a woman, you need not apply." Another said, "It was like common knowledge that they didn't hire women at the time." From this and other testimony in the record, the court finds that Joe's historical practice of not hiring women as food servers resulted in the commensurate reputation. This reputation caused many eligible female food servers not to

attend the annual roll call, considering it a waste of time. This is a significant finding, for Joe's argued at trial that it did not discriminate against women because it hired from an open applicant pool and women simply did not apply. The EEOC agreed that women rarely attended roll calls, but contended this was due to Joe's historical practice and resulting reputation for not hiring female food servers. The court concludes that the EEOC's analysis is correct.

E. Applicant Flow Data

14. Joe's historical practice of not hiring female food servers is statistically demonstrated by comparison to the number of women available for these jobs. Such a comparison is referred to as an "applicant flow data analysis." In other words, information about who applied – "applicant flow data" – is compared with data reflecting who was hired. In a free and open market, applicant flow data should reflect the relevant labor pool *i.e.,* available people who want and are qualified for the job. Therefore, most analysts agree that applicant flow data should be used unless it is incomplete or unreliable.

15. At trial, there was a conflict between the parties' experts as to whether Joe's applicant flow data is complete and reliable. Ms. Elvira Sisolak, an EEOC labor economist, opined that Joe's applicant flow data is skewed and, therefore, unusable. She testified that if eligible female food servers did not apply for positions at Joe's because of the restaurant's reputation for not hiring women, then the available data does not provide an accurate estimate of the number of qualified female food servers interested in these positions. Dr. James T. McClave, the restaurant's expert in statistics, disagreed, contending that the applicant flow

data is accurate and demonstrates that Joe's hired women commensurate to the percentage of women who applied. Based on the court's earlier finding that Joe's reputation caused eligible women to self-select out, the court concludes that Ms. Sisolak's approach is more appropriate.

16. Because applicant flow changed substantially after the EEOC filed its charge, there are two relevant time frames for this analysis: the pre-charge period (October 1986-June 1991) and the post-charge period (July 1991-December 1995). The parties agree that the only applicant flow data available for the pre-charge period is an estimate that perhaps 3% of applicants were women. Actual applicant flow data is available for the post-charge period. On average, 22.02% of applicants for server positions at Joe's in the post-charge period were women:

Season	Women applicants	Women hired
1991-92	15.1%	20.0%
1992-93	21.9%	22.7%
1993-94	23.0%	10.5%
1994-95	26.8%	35.3%
Oct.--Dec.1995	23.3%	20.0%
Average	22.02%	21.7%

17. The flow data based upon actual applicants, both for the pre-charge and for the post-charge period, is unreliable because it is skewed. Female hiring rates at other area restaurants, for example, suggest an available female labor pool much larger than Joe's applicant pool of 22.02%. One neighboring restaurant, the Rusty Pelican, had a wait staff in 1991 that was 35.9% female; during the comparable period, another nearby restaurant, the 94th

Aerosquadron, had a wait staff that was 42.1% female; and the Southpointe Seafood restaurant had a wait staff that was 29.5% female. The plaintiff's expert, Ms. Sisolak, testified that the disparity between these availability figures and both Joe's pre-charge applicant rate of 3% and post-charge applicant rate of 22.02% is significant and cannot have occurred by mere chance. Her testimony is bolstered by witnesses who reported hearing rumors in the summer of 1991 that Joe's would be hiring women in response to charges of discrimination brought by the "Labor Board." The publicity generated by the EEOC's charges apparently increased the number of women applicants to Joe's during the post-charge period. The court finds the testimony on this point to be credible, and accepts Ms. Sisolak's conclusion that the applicant flow data is unusable due to the skewed applicant pool from which it is derived. In reaching this conclusion, the court had the benefit of observing the demeanor of both experts, listening to their testimony, and studying their reports.

F. Alternative Applicant Pool Data

18. Having found the proportion of actual female applicants to be skewed, the court must select alternate data. Ms. Sisolak proposed that 1990 census data be used which, she said, showed that 44.1% of the eligible labor pool was female. This percentage included all female food servers living and/or working in Miami Beach, including cocktail and buffet servers. The defendant's expert, Dr. McClave, contended that the 44.1% figure included servers not qualified to work at Joe's. He contended that the figure had to be refined to include only qualified servers, and proposed doing so by using past earning capacity as a proxy for experience, and, by extension, experience as a

proxy for qualification. Using this method and including only the $25,000-$49,000 income bracket of the census data, Dr. McClave arrived at a refined applicant availability pool of 31.9% women. The salary level used is that of an experienced server at Joe's, that is, a waiter in at least his second season who has obtained a full dinner schedule. To the extent Dr. McClave errs in this refinement, he does so only modestly by omitting, for instance, persons in the same earnings category as a first year server at Joe's. As a means of defining a reliable applicant pool, however, the court finds Dr. McClave's approach to be the more accurate because it accords with the extensive testimony about Joe's method of operation, *i.e.*, the manner in and pace at which food is delivered to the tables. Also, the court considered the evidence gained during its view of the operating restaurant. In light of this testimony and evidence, the court accepts Dr. McClave's approach and finds that at all relevant times, 31.9% of the available labor pool has been female.

Based upon the foregoing findings, the court reaches the following

CONCLUSIONS OF LAW

The EEOC argued alternately under the theory of disparate treatment, based on direct and circumstantial evidence, and under the theory of disparate impact, based on statistical evidence. The court finds that the EEOC has not met its burden of proof under disparate treatment analysis. However, the EEOC has met its burden of proof under the disparate impact model. Accordingly, the court will address only the disparate impact claim in detail.

Sex discrimination under the theory of disparate impact occurs when a facially neutral rule or practice of the employer has a disproportionate impact on one sex. *See Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed.2d 158 (1971). "Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* 401 U.S. at 430, 91 S. Ct. at 853. The premise of disparate impact theory is that some employment practices, adopted without a deliberately discriminatory motive, may be the functional equivalent of intentional discrimination. *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 987, 108 S. Ct. 2777, 2785, 101 L. Ed.2d 827 (1988). "[G]ood intent or the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs,* 401 U.S. at 431, 91 S. Ct. at 854. Accordingly, discriminatory intent is not the focus under this model. Rather, disparate impact analysis is directed at furthering "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*, 401 U.S. at 431-32, 91 S. Ct. at 853. Sex is such an impermissible classification under Title VII. 42 U.S.C. § 2000e-2(a).

To establish a prima facie case of disparate impact sex discrimination, the plaintiff must show that a facially neutral practice of the employer has a disproportionate impact on one sex. Thus, the plaintiff must: (1) allege that there is a disparity between the proportion of women in the available labor pool and the proportion of women

hired; (2) identify the specific employment practice alleged to cause such disparity; and (3) show the causal nexus between that employment practice and the disparity. *Watson,* 487 U.S. at 994, 108 S. Ct. at 2788; *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 656-58, 109 S. Ct. 2115, 2124-25, 104 L. Ed.2d 733 (1989). Once the plaintiff has made a prima facie case, the burden of production shifts to the defendant to show that the challenged practice serves a legitimate business goal. If the defendant does so, the plaintiff bears the ultimate burden of proving that an alternative, non-discriminatory practice would have served the stated goal just as well. The plaintiff prevails if it demonstrates that the defendant did not adopt an available alternative and that, therefore, the discriminatory practice was unjustified.

Before the court proceeds to the prima facie case, a threshold issue requires discussion. In the preceding findings, the court held that Joe's reputation in the community, which reflected the restaurant's historical hiring practice, led potential female applicants not to apply for server positions. Joe's reputation, therefore, was largely responsible for the gender skew in the pool of applicants at the annual roll call. It is well-settled that an employer's reputation for discriminatory hiring practices can lead to a self-selected applicant pool not reflective of the actually available labor pool. Quite irrespective of the intentions of the employer, a rational qualified female candidate is likely to self-select out of the application process, declining to make what she considers a "futile gesture." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-66, 97 S. Ct. 1843, 1870, 52 L. Ed.2d 396 (1977); *Mister v. Illinois Cent. Gulf R. Co.*, 832 F.2d 1427, 1435 (7th Cir. 1987). Thus, the existence of such a reputation is

highly relevant to whether Joe's actual applicant flow data reflects the available labor pool. *See EEOC v. Sheet Metal Workers*, 463 F. Supp. 388, 426 (D. Md. 1978) (existence of discriminatory reputation relevant to whether non-applicant would have applied but for that reputation). Put more narrowly, evidence of Joe's reputation in the food serving community was admitted as highly relevant to whether, how, and why would-be applicants were chilled from applying for traditionally male jobs. *United States v. Central Motor Lines, Inc.*, 338 F. Supp. 532, 558-59 (W.D. N.C. 1971).

While Joe's vehemently contested the admissibility of this reputation evidence, its objections fall wide of the mark. They presuppose that evidence of Joe's reputation was offered as proof of conduct consistent with the reputation, as proof of Joe's hiring practices themselves, or as proof of bad character or intent to discriminate. None of these is the case. Evidence of Joe's reputation was admitted solely to establish the existence of the reputation, and not for any other purpose.

A. Statistical Disparity

Turning to the first element of its prima facie case, the EEOC must demonstrate a statistical disparity between the proportion of women in the available labor pool and the proportion of women hired. Ms. Sisolak, the plaintiff's expert, performed statistical analyses comparing the number of women actually hired as servers by Joe's to the number of women expected to be hired. In each analysis, Ms. Sisolak ran a binomial probability test, which calculated the probability that the disparity between the figures occurred by chance. She then conducted the normal

approximation to the binomial test in order to yield a "z score," or normal standard deviation, indicating that probability. From this result, Ms. Sisolak then reported the minimum rate of women in the labor pool that would result in a statistically significant disparity relative to Joe's hiring rate. Her final step was to see if the percentage of women in Joe's available labor pool exceeded this minimum. If so, then she would conclude that a statistically significant disparity existed. If not, then she would conclude that the disparity was not significant and could be explained by mere chance.

Ms. Sisolak conducted this analysis three times: two of her analyses covered the pre-charge period and the post-charge periods, respectively, and the third analysis covered the [sic] both periods together, *i.e.,* from October 1986 to December 1995.

For the pre-charge analysis from October 1986 to June 1991, Joe's hired 108 waiters. All were men. According to Ms. Sisolak's analysis, even if the applicant pool had contained only 5% women, let alone the 31.9% estimate that the court has found reliable, mere chance could not explain Joe's failure to hire a single woman. Joe's zero female hiring rate leads inexorably to the conclusion that some discriminatory influence is at work -- what the case law terms the "inexorable zero." *See Teamsters,* 431 U.S. at 342 n.23, 97 S. Ct. at 1858 n.23 ("[F]ine tuning of statistics could not have obscured the glaring absence of minorit[ies]. . . . The inference of discrimination came not from a misuse of statistics but from 'the inexorable zero.'").

These statistics from the pre-charge period are the most probative of the EEOC's case. Statistics from the

post-charge period are usually accorded less weight precisely because a lawsuit may be impending. *O'Brien v. Sky Chefs, Inc.,* 670 F.2d 864, 867 (9th Cir. 1982) ("later changes in promotion policies [made after charges were brought] could not erase liability for earlier discrimination") (*citing Teamsters,* 431 U.S. at 341-42, 97 S. Ct. at 1857-58). *See generally* Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases* 4-13 (Shephard's/McGraw-Hill, Inc. 1994) (hereinafter "Paetzold"). "To the extent that post-charge evidence appears more favorable than pre-charge evidence, it may reflect a change in policy following the charge. . . . The appropriate time frame may properly exclude employer conduct that is favorable to the employer but made in anticipation of litigation." Paetzold at 4-13. However, because Joe's is charged with discrimination from July 1991 through December 1995, the court will analyze the post-charge statistics as well.

During the post-charge period from July 1991 until December 1995, Joe's hired eighty-eight waiters, nineteen of whom -- or just under 22% -- were women. Comparing this hiring rate to the available 31.9% women in the available labor pool led the EEOC's expert, Ms. Sisolak, to calculate a "z score" which ranged from 1.96 to 2.07 standard deviations, or a probability of 0.05. Based on this figure, she concluded that the disparity between the two percentages was statistically significant; *i.e.,* that it did not occur by chance. Generally, the law considers a probability level of 0.05, or a disparity of two standard deviations, sufficient to establish that some non-random discriminatory influence is at work. *See Castaneda v. Partida,* 430 U.S. 482, 496 n.17, 97 S. Ct. 1272, 1281 n.17, 51 L. Ed.2d 498 (1977); *Hazelwood School Dist. v. United*

States, 33 U.S. 299, 308, 311 nn.14, 17, 97 S. Ct. 2736, 2742-43 nn.14, 17, 53 L. Ed.2d 768 (1977); *Eastland v. Tennessee Valley Authority,* 704 F.2d 613, 622 n.12 (11th Cir. 1983), *cert. denied,* 465 U.S. 1066 (1984). *But see Stender v. Lucky Stores, Inc.,* 803 F. Supp. 259, 323 n.22 (N.D. Cal. 1992) (cautioning against formulaic application of standard). Viewed against this general legal standard, without more, Ms. Sisolak's z score of 1.96 to 2.07 standard deviations is ambiguous. Without any other consideration, the lower end of the range falls below the legal standard of two standard deviations and supports a conclusion that mere chance accounts for the disparity. On the other hand, the higher end of her range exceeds the legal standard and supports the more damning conclusion that chance does not account for the disparity. These calculations, however, shed their ambiguity when interpreted in light of Joe's knowledge of the EEOC's investigation.

Joe's knew in July of 1991 that the EEOC had commenced its investigation. Still, the restaurant continued with a hiring process that produces a disparity in the hiring of women. In this context, Ms. Sisolak's z score of 1.96 to 2.07 standard deviations is no longer ambiguous. Rather her calculation shows that, although Joe's hiring of women has been improving, its system has not been adequately purged of the influences which affected women so adversely in the pre-charge period. Thus, the court concludes that Joe's hiring continues to exhibit a significant disparity in the post-charge period, although to a lesser degree than in the pre-charge period.

Ms. Sisolak's analysis of the entire ten year period -- both pre- and post-charge together -- is consistent with her analysis of the two periods separately. In particular, she

opined that Joe's hiring of females during the ten year period showed evidence of a disparate impact on women even if only 15% of the available labor pool had been female. Thus, given that the percentage in the available labor pool was actually 31.9%, she found strong evidence of non-random factors which had the effect of excluding women from the food server positions. Accordingly, through all three analyses, the EEOC has satisfied the first element of its prima facie case, and the court turns to the second element.

B. Challenged Employment Practice

The second element of the prima facie case requires the identification of the employment practice alleged to be the cause of the disparity. Disparate impact analysis encompasses facially neutral rules or policies as well as employment practices of a subjective or discretionary nature. *Watson,* 487 U.S. at 990-91, 108 S. Ct. at 2786-87. Two or more components of a hiring process may interact to result in a disparate impact. *See Griffin v. Carlin,* 755 F.2d 1516, 1525 (11th Cir. 1985); 42 U.S.C. § 2000e-2(k) (if elements of decisionmaking process are not capable of separation for analysis, process may be analyzed as one employment practice). *See also Stender,* 803 F. Supp. at 320 (this formulation is designed to combat subconscious stereotypes and prejudices which might result in discrimination even absent an intentional practice or explicit policy to that effect).

The challenged employment practice in this case is management's undirected and undisciplined delegation of hiring authority to subordinate staff. The Supreme Court in *Watson* noted that delegating "employment decisions to

those employees who are most familiar with the jobs to be filled and with the candidates for those jobs" can constitute an employment practice within the meaning of disparate impact theory. *Watson,* 487 U.S. at 990-92, 108 S. Ct. at 2786-87. The Court was careful to point out that such delegation is not by definition unlawful, with the following important caveat:

> It does not follow . . . that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. . . . If an employer's *undisciplined system of subjective decisionmaking* has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.

Id. (emphasis supplied).

The management of Joe's -- without the benefit of policies or guidelines -- delegates total and complete discretion to subordinates in hiring food servers. At least for the pre-charge period, management never conveyed its concern about compliance with gender-based civil rights laws. When subordinate staff filled 108 sequential vacancies with male servers, management never raised a question nor voiced an objection. This silence signified approbation. Jo Ann Bass confirmed the absolute nature of this delegation when she testified: "I have nothing to do with hiring or firing. I give an overall view as to something that I see as glaring." Although she always sits in on the annual roll call, Mrs. Bass has never instructed the hiring

staff how to select servers and does not set out guiding principles. Thus, the subordinates are left to make decisions according to their own subjective intuition. Moreover, their judgment of what is appropriate is informed largely by their own experience in the restaurant's atmosphere of all-male service.

Not only is the hiring staff's discretion unguided from above, it also lacks the internal discipline necessary to restrain the subjectivity of those charged with this task. The hiring staff uses subjective interviews to evaluate applicants. The criteria used -- appearance, attitude, articulation and experience -- are not defined or standardized between interviewers. Some criteria, such as appearance and attitude, are by definition subjective and necessarily result in a subjective process overall. As the *Watson* Court explained: "However one might distinguish 'subjective' from 'objective' criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature." *Watson,* 487 U.S. at 989, 108 S. Ct. at 2786.

Indeed, even in as objective a category as experience, no consensus emerges from the testimony of hiring staff as to what constitutes sufficient experience to qualify a candidate. Some believe that prior single service experience -- as opposed to team service experience -- is required; others do not. Some candidates with decades of experience are rejected, while others without any experience are hired. For example, Barbara Fitzpatrick, an applicant with twenty years of serving experience, was not thought to merit invitation to even the probationary trailing period, while a male applicant without any prior experience was hired and cited by Roy Garret and Raymond Damiano as being a "one in a million" server. Likewise,

hiring staff members differ as to what restaurants are "similar" to Joe's for purposes of experience. Hiring staff members are neither provided with, nor do they develop their own, methodology to ensure that each interviewer evaluates and weighs the four factors in a consistent, objective, and unbiased manner. As a result, Joe's hiring process is unduly vulnerable to improper influences.

With the announcement of the EEOC's investigation, Joe's management -- for the first time -- voiced its concern that the hiring process should be gender-neutral. In addition, management instituted steps to mitigate subjectivity in the interviewing and rating process by directing the daytime maître d' to conduct interviews in conjunction with another maître d'. This joint interviewing mechanism was subsequently expanded to incorporate a panel of three interviewers, and changed, still later, to include a woman. Thus, in the post-charge period, the management at Joe's took several concrete steps to move toward gender-neutral hiring of servers.

That management's changes improved the process is reflected in the statistics. From July of 1991 onward, Joe's began to hire females as food servers -- boosting the proportion of females hired each year from the "inexorable zero" to the 21.9% previously noted. Certainly, Joe's management is to be commended for taking these steps; however, they were not enough to overcome Joe's history of being an all-male server establishment and the corresponding reputation Joe's created.

While management's introduction of a panel system for interviewing may dilute the subjective views of any one evaluator, it does not overcome management's failure to develop uniform, gender-neutral guidelines to ensure that

all interviewers interpret criteria in the same manner and apply them consistently. Even though management also began to voice its concern about a gender-neutral hiring process, it has not otherwise restructured its broad delegation of hiring authority. Most importantly, it has not taken the reasonable steps necessary to counteract its reputation as a restaurant that does not hire women. As a result, the lack of managerial oversight and lack of standardization that characterized the pre-charge period also persist into the post-charge period.

C. Causal Connection

Having shown a disparity in the hiring of women and an employment practice which could account for the disparity, the remainder of the EEOC's case becomes one of causation. That is, does Joe's undirected and undisciplined delegation of hiring authority cause the disparity between the number of women hired as servers and the number of women available, or are forces outside the hiring process -- such as a deteriorating neighborhood, low turnover, or the heavy lifting required of servers -- to blame? To prevail on this question, the EEOC must provide statistical evidence "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs and promotions because of their membership in a protected group." *Watson,* 487 U.S. at 994, 108 S. Ct. at 2789. The disparity must be so substantial that it raises an inference of causation. *Id.; see Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425, 95 S. Ct. 2362, 2375, 45 L. Ed.2d 280 (1975).

Certainly the statistics presented in this case, most notably the statistics for the five year pre-charge period

during which not one female food server was hired, are substantial and persuasive. They support the inference that the restaurant's uncircumscribed delegation of hiring caused the disproportionate exclusion of women from server positions. Even substantial statistics, however, do not suffice when standing alone. The Supreme Court has cautioned that "their usefulness depends on all of the surrounding facts and circumstances." *Teamsters,* 431 U.S. at 339-40, 97 S. Ct. at 1856 (where "cold numbers" were brought to life only by additional testimony). That is, the circumstances of the case must lead to the conclusion that the hiring practice in fact caused the disparities. Justice Holmes once said, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner,* 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L. Ed. 963 (1921). So too in this case, a paragraph of historical context is worth a volume of statistics.

As the court detailed in its findings of fact, Joe's has been a "male server type" establishment for the better part of this century. While women have predominated among Joe's owner/managers, as well as among the laundry, cashiering, and take away staff, women have systematically been excluded from the most lucrative entry level position, that of server. So accepted was this practice that Joe's general manager, Robert Moorehead, candidly admitted that it never occurred to him that something might be wrong when 108 positions were filled sequentially with male applicants between 1986 and 1990. Many witnesses testified that, as a result of this known practice, Joe's created a reputation for not hiring women servers and thereby induced qualified women to self-select out of the applicant pool at roll call. As a result, the roll call became skewed and remains skewed to the present day.

By failing to address its entrenched reputation and the resulting effect on the roll call, Joe's leaves undisturbed a significant factor causing the ongoing exclusion of women from server positions. Unless and until Joe's takes reasonable steps to confront the reputation it has created, it will continue to experience skewed applicant pools at its annual roll call. Furthermore, without additional guidance and structuring by management, there is no assurance that female applicants who attend roll call will be treated even-handedly. This persistent legacy provides the causative link. It explains how Joe's unguided and undisciplined delegation of hiring authority continues on and produces the harm of a disparate impact in the hiring of female food servers. With this proof, the EEOC completes its prima facie case.

D. Legitimate Non-Discriminatory Reasons and Possible Alternatives

To rebut the EEOC's prima facie case, Joe's put on evidence suggesting that it had "legitimate, non-discriminatory reasons" for the employment practice in question. *See Watson,* 487 U.S. at 986, 108 S. Ct. at 2784. Such reasons, if sufficient, may defeat the EEOC's case unless the EEOC adequately establishes that an alternative practice is available which would achieve the same business end without the undesirable effect on minorities. *Wards Cove,* 490 U.S. at 661, 109 S. Ct. at 2126-27; *Watson,* 487 U.S. at 998, 108 S. Ct. at 2790-91; 42 U.S.C. § 2000e-2(k). Under the law, the availability of alternative non-discriminatory practices undermines the legitimacy of any employment practice which has a disparate impact on women. *Albemarle Paper Co.,* 422 U.S. at 425.

In this case, the evidence of Joe's legitimate reasons for its practice centers on the simplicity of the roll call. It is cost-effective and efficient, providing an ample supply of qualified, albeit predominantly male, applicants. The roll call requires *de minimis* expenditures for recruitment and little investment of time in screening. Furthermore, the delegation of hiring to the daytime maître d' frees senior management for other tasks during the hectic season opening. However, even assuming for the sake of argument that these reasons satisfy Joe's burden of production on rebuttal, they are overcome by the availability of equally effective, non-discriminatory alternative practices which are also in evidence.

To be sufficient, a proposed alternative must be commensurate with the defendant's chosen practice in achieving legitimate employment goals, such as the "employer's legitimate interest in efficient and trustworthy workmanship." *Dothard v. Rawlinson,* 433 U.S. 321, 329, 97 S. Ct. 2720, 2727, 53 L. Ed.2d 786 (1977). Increased cost and other burdens imposed by an alternative practice must be considered in making this determination. *Wards Cove,* 490 U.S. at 661, 109 S. Ct. at 2127. While the court need not decide everything that Joe's should have done to avoid liability under Title VII, the evidence reflects that Joe's had a range of salient alternatives to its current practices which could have been used to offset the subjectivity of its hiring and the reputation it had made for itself through its history of all-male hiring.

First, Joe's management could have established firmer definitions for the four criteria it uses to evaluate applicants. Joe's could have standardized the application of these criteria across the members of its hiring panel. Each of these measures would better address the subjectivity

which still lurks so harmfully in Joe's hiring process. And the measures could do so without in any way impairing the other benefits of the roll call system that Joe's finds so cost-effective.

Second, there is abundant testimony in the record that Joe's is an institution which receives frequent publicity in the local media. Management could have used these existing channels of publicity to clarify its commitment to being an equal opportunity employer. In other words, Joe's had public opportunities to repudiate its reputation for hiring only males. That such publicity is effective is demonstrated by the jump in the proportion of female applicants and female hirees at Joe's in the wake of the publicity surrounding the announcement of the EEOC's investigation.

Third, Joe's asserted at trial that from time to time it places hiring advertisements in the local newspapers. Any of these advertisements could have included the statement that Joe's is an equal opportunity employer. Such a statement would have imposed negligible additional cost on Joe's. Yet, it too would have been another way to offset Joe's reputation that was so long in the making.

Fourth, Joe's could have used the roll call itself to spread the word of its openness to female servers. The same grapevine that Joe's relies upon to attract people to the annual roll call and which induces women to self-select out of the process could have been turned around to bring Joe's into compliance with federal law. For example, at the roll call, when Jo Ann Bass told everyone "the kind of place we are," she could also have announced, "We are an equal opportunity employer." Incumbent servers could have been told this same message at the close of the

season, in anticipation of spreading the word prior to the following fall's hiring.

All of these mechanisms could have been used by management to convert Joe's hiring system into a gender-neutral one, had management so chosen. Thus, even assuming that Joe's hiring process served a "legitimate employment goal" within the meaning of the law, the identical process with cost-free adjustments could have achieved the same goals without resulting in an adverse disproportionate impact on women. However, Joe's failed to make the available adjustments. Accordingly, the EEOC's prima facie case stands unrebutted.

E. Summary

The evidence proves that Joe's undirected and undisciplined delegation of hiring authority has a disparate impact on women interested in server positions at the restaurant. While Joe's has never hung a "Males Only" sign on its door, nor had an explicit policy of hiring only male servers, its facially neutral hiring practices operate to exclude women and perpetuate the restaurant's male server tradition. Title VII expressly forbids practices resulting in an unjustifiable disparate impact on women, including practices simply carried on from pre-Title VII days. Accordingly, having found an illegal disproportionate impact which is traceable to Joe's employment practices, the court finds Joe's guilty of violating Title VII from October 1986 through December 1995.

DECRETAL PROVISIONS

For the foregoing reasons, it is hereby

ORDERED and **ADJUDGED** as follows:

(1) Partial final judgment shall be entered in favor of the plaintiff, the Equal Employment Opportunity Commission, and against the defendant, Joe's Stone Crab, Inc.

(2) This court reserves jurisdiction to conduct a bifurcated trial on damages and other affirmative and injunctive relief at a future setting.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida, this 3rd day of July, 1997.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

Copies furnished to:

Gedety Serralta, Esq., and Donald Tyler, Esq., for the plaintiff Equal Employment Opportunity Commission (EEOC), Miami District Office, Two South Biscayne Boulevard, Suite 2700, Miami, Florida 33131

Robert D. Soloff, Esq., Donald M. Papy, Esq., and Kim L. Picasio, Esq., for the defendant Joe's Stone Crab, Inc., 888 Southeast Third Avenue, Suite 400, Fort Lauderdale, Florida 33316.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Miami Division

Case No.: 93-1082-CIV-HIGHSMITH

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

PLAINTIFF,

vs.

JOE'S STONE CRAB, INC.,

DEFENDANT.

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO AMENDED COMPLAINT

Defendant, by and through undersigned counsel, answers the Amended Complaint as follows:

1. Admit that jurisdiction is invoked pursuant to these statutes.

2. Admit that venue would be proper, but deny the other allegations in this paragraph.

3. The statutory provision cited speaks for itself.

4. Deny that Defendant does business in the City of Miami, but admit the remaining allegations of the paragraph.

5. Admit.

6. Deny that all conditions precedent to the institution of this lawsuit have been fulfilled.

7. Without knowledge as to the date the document was executed by former Chairman Kemp, admit the remaining allegations of the paragraph.

8. Admit.

9. Admit.

10. Admit.

11. Admit that conciliation was attempted but deny that legally adequate efforts at conciliation were made by the EEOC.

12. Admit that the conciliation attempted was unsuccessful.

13. Deny.

14. Deny.

15. Deny.

16. Deny.

17. Deny.

18. Deny.

19. Any allegations not specifically addressed herein are denied.

Defense

The Amended Complaint fails to state a claim upon which relief can be granted.

Affirmative Defenses

First

The EEOC has failed to fulfill all conditions precedent to filing this action, including but not limited to adequately attempting conciliation of the charge of discrimination.

Second

The EEOC is barred by the doctrine of laches from pursuing this action which purports to cover the time period commencing October 1986.

Third

Even if EEOC were to establish an adverse impact based upon a discrete employment practice, the qualifications for the position of server constitute business necessity and are job-related.

Fourth

Even if EEOC were to establish adverse impact, the pool of female applicants was affected by the lack of interest in the particular job.

Fifth

This action was not brought within the time limitations periods established by Title VII.

Sixth

The qualifications for the position of server are reasonably necessary to the normal operation of the particular business.

Respectfully submitted,

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and

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Attorneys for Defendant

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing was mailed to Karen A. Khan, Esquire, Equal Employment Opportunity Commission, Attorneys for Plaintiff, One N.E. First Street, Metro Mall – 6th Floor, Miami, Florida 33132, this 27 day of September 1993.

/s/ Donald M. Papy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, V. JOE'S STONE CRABS, INC., Defendant.	)	Civil Action No. 93-1082-CIV-HIGHSMITH AMENDED COMPLAINT

NATURE OF THE ACTION

This an action under Title VII of the Civil Rights Act of 1964, as amended, ("Title VII") to correct unlawful employment practices on the basis of sex, female, and to make whole all persons aggrieved by said employment practices. The Defendant, Joe's Stone Crabs, Inc., intentionally discriminated against women as a class by failing and/or refusing to employ them to wait tables from at least October 1986. Defendant's recruitment and selection practices had an adverse impact on the selection of qualified female applicants and discouraged qualified females from making application. A list of aggrieved females known to date is attached hereto as "Exhibit A" and incorporated as part of this Complaint.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964,

as amended, 42 U.S.C. Section 2000e-5(f)(1) and (3). ("Title VII").

2. The unlawful employment practices were committed within the jurisdiction of the United States District Court for the Southern District of Florida, Miami Division.

PARTIES

3. Plaintiff, Equal Employment Opportunity Commission (the "Commission" or "EEOC"), is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII, and is expressly authorized to bring this action by Section 706(f)(1) of Title VII, 42 U.S.C. Section 2000e-5(f)(1).

4. At all relevant times, Defendant, Joe's Stone Crabs, Inc. (the Employer), has continuously been and is now a Florida corporation doing business in the State of Florida and the City of Miami, and has continuously had and does now have at least fifteen employees.

5. At all relevant times, Defendant Employer has continuously been an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e-(b), (g) and (h).

STATEMENT OF CLAIMS

6. More than thirty days prior to the institution of this lawsuit, EEOC Commission Chairman Evan J. Kemp, Jr. filed a charge with the Commission alleging violations of Title VII by Defendant Employer. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. The Charge of Discrimination (Charge No. 150 91 2534) was executed by former Chairman Kemp on June 17, 1991. The Defendant was notified of the Charge of Discrimination.

8. The Equal Employment Opportunity Commission investigated the Charge of Discrimination instituted against the Defendant. The Defendant participated in the Commission's investigation.

9. On or about April 27, 1992, the EEOC transmitted its Decision on the merits of Charge No. 150 91 2534 to the Defendant, finding that there was reasonable cause to believe that the Defendant violated Title VII of the Civil Rights Act of 1964, as amended. The Defendant received the Commission's Decision regarding Charge No. 150 91 2534.

10. Upon finding that there was reasonable cause to believe that the Defendant violated Title VII, the Defendant was invited to engage in conciliation efforts.

11. The EEOC attempted to conciliate the Charge of Discrimination.

12. Conciliation in this case was unsuccessful.

13. Since at least October 1988 Defendant Employer, Joe's Stone Crabs, Inc., has engaged in unlawful employment practices at its Miami, Florida facility, in violation of Sections 703(a)(1) of Title VII, 42 U.S.C. Section 2000e-2(a)(1).

14. Since at least October 1988, Defendant Employer discriminated on the basis of sex when it failed to recruit women to wait tables. Defendant recruited men to wait tables but not women.

15. For five years between October 1986 and October 1991 Defendant Employer engaged in disparate treatment by failing to hire females to wait tables because of their sex.

16. Defendant Employer employed discrete employment practices, namely, word-of-mouth recruitment, which had an adverse impact on the recruiting and hiring of females for wait positions.

17. Defendant discouraged women from applying for wait positions from at least October 1986 to at least October 1991.

18. The effect of the practices complained of above has been to deprive qualified female applicants and qualified females who were discouraged from making application, of employment opportunities and otherwise adversely affect their status as employees because of sex.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant Employer, its partners, officers, successors, assigns and all persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of sex.

B. Order Defendant Employer to institute and carry out policies, practices and programs which provide equal employment opportunities for females and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant Employer to make whole qualified female applicants and qualified females who were discouraged from making application by providing appropriate backpay with prejudgment interest, in amounts to be proved at trial, make whole relief, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to, employment of aggrieved females.

D. Grant such further relief as the court deems necessary and proper in the public interest.

E. Award the Commission its costs in this action.

Respectfully submitted,

JAMES R. NEELY, JR.
Deputy General Counsel

PHILIP B. SKLOVER
Associate General Counsel

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DATE: 9-10-93

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EXHIBIT A

1. Tatia Nichols
2. Raquel Munoz
3. Lisa Hurst
4. Catherine Stratford
5. Kathleen Folden
6. Maura Carles
7. Maureen Carney
8. Miriam Savoy
9. Mary G. Schudlick
10. Elizabeth Santos Gourdine
11. Francisca Ligia Brandmark
12. Sherry Ann Kuge
13. Cynthia Berman
14. Robin Batson
15. Dawn Keon
16. Carolyn Bogdanski
17. Carol Coyle
18. Barbara Askland

DECISION

CHAIRMAN EVAN J. KEMP JR.

Charging Party

vs.

JOE'S STONE CRABS, INC.

Respondent

Charge No. 150 91 2534

Date of Alleged Violation: October 1986 and continuing

Date Charge Filed: June 25, 1991

I. INTRODUCTION

A. SUMMARY OF THE CHARGE

Charging Party, Chairman of the Commission, alleges that Respondent unlawfully discriminated against women because of their sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. Charging Party alleges that, since at least October 1986, Respondent has discriminated against women with respect to recruitment, hiring, and assignment into various service worker positions that involve waiting and bussing restaurant tables and tending bar. Charging Party also alleged that Respondent failed to file Employer Information Reports (EEO-1) from at least 1986 to 1990. The Commission served Respondent with the charge on July 5, 1991.

B. JURISDICTION

Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.

§§ 2000e *et seq.* (1991). Timeliness and all other requirements for coverage have been met.

C. SUMMARY OF THE INVESTIGATION

The investigation covered the period from October 1986 to November 30, 1991, and focused on Respondent's recruitment, hiring and assignment activities for the job titles of wait persons, bussers and bartenders. The Commission examined available personnel and payroll records obtained from Respondent. The Commission found that Respondent did not keep applicant data prior to October 8, 1991, because it routinely discarded applications at the end of its season in mid-May of each year. The Commission interviewed Respondent's representatives, current and former personnel, and applicants to determine Respondent's recruitment and hiring practices and whether women were discouraged from applying as wait persons, bartenders, and bussers and not given serious consideration when they applied. The Commission also reviewed applications available post-October 8, 1991 to identify those women who applied for wait positions, compare their qualifications with those of the male applicants and examine Respondent's selection criteria.

D. SUMMARY OF FINDINGS

Based on the facts and analysis below, the Commission finds reasonable cause to believe that Respondent has engaged and continues to engage in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964. Specifically, Respondent has failed and continues to fail to recruit women for wait positions because of their sex. From at least October 1986 until October 1991,

Respondent failed to hire women for wait positions because of their sex.

The Commission finds no reasonable cause to believe that Respondent has discriminated against women by failing to assign them as dinner servers, but makes no finding as to whether Respondent failed to recruit or hire women for bussing or bartending positions.

The Commission finds that Respondent has come into compliance with 29 C.F.R. § 1602 Subpart B (1991) by filing EEO-1 Reports for 1989, 1990 and 1991.

E. RESPONDENT'S BUSINESS AND EMPLOYMENT ACTIVITY

Respondent is a highly regarded seasonal dining establishment with a national reputation. Respondent operates a single facility consisting of a bar and several dining rooms, which is open for business from mid-October to mid-May. At the beginning of each season in October, Respondent conducts an annual recruitment ("roll call") for all seasonable, non-management positions. About a week before the restaurant opens for business, applications are taken and new applicants are interviewed by two male maitre d's.

From 1986 to October 1991, Respondent employed 131 customer service staff consisting of 4 bartenders, 21 bussers, and 106 wait persons. Only one female wait person was hired during that entire period. No female wait persons were hired from at least January 1987 to May 1991, the end of Respondent's season. As of November 22, 1991, Respondent had employed in the dining area: 2 maitre d's, 4 captains, 7 bartenders, 22 bussers, and 73

wait persons. Respondent hired three women in October 1991, post-charge, for wait positions.

II. RESPONDENT'S RECRUITMENT PRACTICES

The Commission finds reasonable cause to believe that Respondent engages in a pattern or practice of discrimination by failing to recruit women for wait person positions on an equal basis with men.

From January 1987 to October 1991, Respondent's wait staff was 100% male. Respondent seldom advertises to fill its wait positions and did not advertise the 1991 roll call in the local newspaper. Its largest source of applicants is word-of-mouth recruitment for the annual roll call by wait persons who worked during the prior season. This reliance on word-of-mouth referral is clear from interviews with Respondent's officials and current and former employees. For example, one maitre d' always instructed employees to tell others about the next season's roll call. Interviews with 57 employees during the 1991 season disclosed that 50 (87.7%) were recruited by word-of-mouth, 6 (10.5%) were walk-ins, and 1 (1.8%) responded to a newspaper advertisement for a prior season. Of the 17 applicants hired in 1991 as wait persons, 12 (71%) were recruited through word-of-mouth, and 3 (18%) were walk-ins.[1]

Evidence obtained by the Commission indicates that Respondent's male dining room personnel knew that Respondent desired to maintain its all-male customer

[1] Since, prior to October 1991, Respondent did not maintain application forms or logs, the Commission was unable to analyze actual applicant information for the previous seasons.

service staff. As a result of Respondent's reliance on word-of-mouth recruitment and its reputation for sex bias, currently employed personnel refer males to Respondent for hiring consideration during the roll call and for mid-season vacancies. Witnesses indicated that very few women -- 2 to 4 each year -- attended Respondent's roll call prior to October 1991.

During the roll call for the 1991 season, which was post-charge, only 16 of the 101 applicants appearing at the roll call were female. Interviews with the female applicants disclosed that five of them applied because they learned from Respondent's employees that the restaurant was planning to hire three women for the season. Six of the 16 female applicants indicated that they did not apply in prior years because it was well known that Respondent did not hire women as wait persons, and they therefore felt that applying was a waste of time.

An analysis of the applicant information for the 1991 season revealed that the 16 applications from women constituted only 15.8% of all applications for wait person positions. This level of female applicant flow is substantially below the level of female availability. The 1980 Census data for the Miami metropolitan statistical area, which includes all of Dade County, reported female availability for wait positions at 69.6%. The Commission found that the disparity between Respondent's female applicant flow and the relevant civilian labor forces statistically significant.

Witnesses revealed that while Respondent actively sought to recruit males to fill its server positions, it intentionally discouraged women from applying. Females telephoning to inquire about wait positions were told that the restaurant

was not hiring wait persons or that the positions were already filled.

Finally, interviews with current and former employees revealed that Respondent has a reputation of being an establishment that does not hire female wait persons because of their sex. Interviews with current employees revealed that many believe that wait positions are "men jobs."[2] Interviews with female employees in Respondent's take-out area revealed that they were informed by other employees that only men were hired as wait persons.

Qualified female wait persons in the community substantiated Respondent's reputation for discriminating on the basis of sex. The Commission interviewed women who indicated that they and others knew about Respondent's desire not to hire females for wait jobs and felt that applying for a wait person would be futile.

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[2] Interviews with the current customer service staff indicate a general belief that women cannot perform the tasks required of wait persons at the restaurant. The following statements were made by male wait staff:

> " . . . I do not think that females can do the job because the work is very physically demanding due to the weight of the trays and how long you have to carry the tray before the checker checks them out."
>
> " . . . I don't know any female waitresses who can do this job. It requires a lot of strength because the trays are too heavy. I have only recommended males to apply for server's positions."
>
> " . . . I wouldn't like my mother or sister to work here because the trays are too heavy."
>
> " . . . Most females cannot do the job because it is very hard work."

III. RESPONDENT'S HIRING PRACTICES

The Commission finds reasonable cause to believe that Respondent's hiring practices limited employment opportunities for women as a class by failing to hire them for wait positions.

Respondent uses subjective selection criteria in its hiring decisions. The two male maitre d's rate all applicants for wait person positions on the following criteria: appearance, communication skills, attitude, and references. The maitre d's also seek to determine if the applicants have had experience working at restaurants that have "heavy tray" services. The applicants are graded on a scale ranging from 50 to 100 and are hired in order of their numerical rating provided that they receive positive references. The Commission found that, despite Respondent's claim that it only hires experienced applicants for wait jobs, Respondent has hired males for wait positions who did not have any previous restaurant experience or who lacked work experience with heavy trays. Of the 14 males hired as wait persons in 1991, the Commission specifically identified three who had not had prior experience with heavy trays. By contrast, of the three female wait persons hired in 1991, two had prior experience carrying heavy trays.

The Commission has determined from available records and testimony that from January 1987 to the close of the 1991 season, Respondent maintained an all-male wait person workforce despite female availability for wait positions in Dade County at 69.6%. Post-charge, 16 women and 85 men applied for 17 open positions and Respondent hired three women and 14 men. While in October 1991 Respondent hired women at a rate consistent with its

female applicant flow, Respondent's female applicant flow was still far below availability and tainted due to its reputation for sex bias.

Respondent contends that the reason for the lack of female wait persons at its establishment is that very few women apply for these jobs because they are aware of the strenuous nature of the tasks involved. Respondent officials stated that the job involves carrying trays that frequently weigh more than 50 pounds while walking rapidly through a crowded dining room, and that there is no "team work." Each server is required to take care of three stations, five or six times during each lunch or dinner. Respondent submitted no evidence to indicate that individual female applicants were unable to perform the required tasks.

Respondent further contends that the few women who have applied were rejected because they were not qualified. The Commission cannot verify this explanation, since Respondent maintained no prior applications or pre-employment records. However, Respondent previously employed four female wait persons prior to 1987,[3] and submitted no evidence to indicate that their job performance was ever anything other than satisfactory. There is no indication that these women were unable to carry the trays; one was employed for seventeen seasons prior to 1987.

---

[3] One female cashier transferred to the wait person position in November 1986 and quit in January 1987; three female wait persons were hired prior to 1986.

IV. RESPONDENT'S ASSIGNMENT PRACTICES

All wait persons begin their employment by serving lunches and continue in that capacity for one to three years before they are scheduled to serve dinners on a regular basis, depending upon the employee's skill level and the number of openings for dinner servers. As a result of Respondent's failure to hire women for any wait positions, there were no female candidates for assignment as dinner servers. The Commission finds no reasonable cause to believe that Respondent has discriminated against women as a class by failing to assign them as dinner servers.

V. RECRUITMENT AND HIRING FOR BUSSERS AND BARTENDERS

Respondent's practice has been to hire bussers from the roll call or transfer interested kitchen employees who display an ability to work in the dining area. The Commission found that there were no female applicants for busser positions during the investigatory period. No women employed by Respondent in the kitchen area were interested in busser positions, and none knew of any woman who had shown an interest in the job. The Commission makes no finding as to whether Respondent discriminated on the basis of sex in recruitment or hiring for bussing positions.

Only four persons, each male, were hired as bartenders from 1986 to 1991. Given the insufficient evidence regarding recruitment and hiring, the Commission makes no finding as to whether Respondent discriminated on the basis of sex in recruitment or hiring for bartending positions.

VI. FAILURE TO FILE EEO-1 REPORTS

The investigation revealed that Respondent failed to file EEO-1 Reports since at least 1986. After receiving notice of the violation from the Commission, Respondent filed an EEO-1 Report for 1989. Respondent subsequently submitted EEO-1 Reports for 1990 and 1991. Accordingly, the Commission finds that Respondent has come into compliance with 29 C.F.R. § 1602 Subpart B (1966).

VII. DISCUSSION

The Commission finds that, since at least 1986, Respondent has engaged in a pattern and practice of discrimination against women by failing to recruit and hire females for wait positions. These practices constitute Respondent's "standard operating procedure -- the regular rather than the unusual practice." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

A. RECRUITMENT

The Commission finds that Respondent's reliance upon word-of-mouth recruitment and its reputation for sex bias resulted in a gross statistical disparity between its rate of female applicants and the rate of female availability in the relevant work force. Word-of-mouth referral may be facially neutral, but as practiced by Respondent's male workforce, tends to isolate women from the "web of information" concerning job opportunities, and perpetuates the workforce imbalance. *United States v. Georgia Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973); *see also Franks v. Bowman Transp. Co.*, 495 F.2d 398, 419 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976); *Catlett v. Missouri Highway Transp. Comm'n*, 589 F. Supp. 929,

946-47 (W.D. Mo. 1983); *EEOC v. Local 798 of the United Ass'n for Journeymen and Apprentices of the Plumbing and Pipefitting Indus.*, 646 F. Supp. 318 (N.D. Okla. 1986). Respondent's actions prevent women from learning of job opportunities and deter applications from women who are aware of vacancies but who are unwilling to subject themselves to "explicit and certain rejection." *Teamsters*, 431 U.S. at 365. Female potential applicants who failed to apply solely because of their unwillingness to engage in a futile gesture are as much the victims of discrimination as if they had gone through the motions of applying and been rejected. *Teamsters*, 431 U.S. at 366.

In addition, Respondent has a reputation in the community for sex bias, creating a perception reasonably based in fact, that female applicants are not hired. Respondent fosters this reputation not only by failing to hire women but also by discouraging female potential applicants who make telephone inquiries about wait positions. This accurate perception held by women in Respondent's labor market continues to restrict the female applicant flow. *See Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986); *see Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir.) (*en banc*), *cert. denied*, 419 U.S. 895 (1974). The Commission concludes that Respondent's use of word-of-mouth recruitment, active discouragement of female applicants, and reputation in the community for sex bias accounts for the depressed female applicant flow.

B. HIRING

The Commission finds that Respondent engages in hiring practices that limit the employment opportunities of women. In general, nondiscriminatory hiring practices

should result in a workforce that more or less reflects the composition of the community. *Teamsters*, 431 U.S. at 340 n.20. Specifically, the workforce should parallel the composition of the qualified population in the relevant labor market. *Id.*; *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977).

In its investigation, however, the Commission found statistically significant differences between the representation of women in Respondent's wait person workforce and the labor market availability for this job category in Dade County. As a result of its recruitment practices, Respondent's wait person workforce remained 100% male from January 1987 to May 1991.

Evidence of Respondent's disparate treatment of female applicants and the gross imbalance between its rate of female hires and female representation in the qualified labor market establishes a prima facie case of discrimination against female applicants. *Hazelwood*, 433 U.S. at 307-08; *see Payne v. Trayenol Laboratories*, 673 F.2d 798 (5th Cir. 1982), *cert denied*, 459 U.S. 1038 (1982). The Commission identified women working at other dining establishments who were qualified to perform the wait position at Respondent's facility, and who were discouraged from applying.

Respondent's subjective selection process by the male maitre d's contributed to the discriminatory treatment of female applicants. *See Watson v. National Linen Service*, 686 F.2d 877, 881 (11th Cir. 1982); *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984); *Winfield v. St. Joe Paper Co.*, 38 EPD ¶ 35,580 at 39,590 (N.D. Fla. 1985), *settled*, 45 EPD ¶ 37,783 (N.D. Fla. 1988).

Respondent excluded all women from wait positions from January 1987 to May 15, 1991. Accordingly, Respondent is unable to rebut the inference of discrimination because of the "inexorable zero" created by the long absence of women from the position during that period. *See Franks*, 495 F.2d at 419; *United States v. T.I.M.E. – D.C.*, 517 F.2d 299, 315 (5th Cir. 1975), *vacated sub nom, Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Hester v. Southern Ry. Co.*, 497 F.2d 1374, 1379 (5th Cir. 1974); *Kaplan v. I.A.T.S.E., Local 659*, 525 F.2d 1354, 1358 (9th Cir. 1975).

The Commission concludes that the total exclusion of women from wait positions from January 1987 to May 1991 and the continued disparate treatment of women in recruitment is attributable to Respondent's discriminatory practices of relying on word-of-mouth referrals from its all-male workforce, its largely subjective hiring process, and its reputation for discriminatory hiring practices.

VIII. AFFECTED CLASS

The affected class consists of qualified women who have applied or wait positions from October 1986 to May 1991 and were not hired. The affected class also includes qualified women who would have applied for wait positions but for Respondent's recruitment practices, or who were deterred from applying because of Respondent's reputation for sex bias.

IX. CONTINUING VIOLATION

Respondent's ongoing failure to recruit women for wait positions constitutes a continuing violation of Title VII. *See Delaware State College v. Ricks*, 449 U.S. 250 (1980); *United Airlines v. Evans*, 431 U.S. 553 (1977); *Electrical*

Workers I.U.E. v. Robine & Meyers, Inc., 429 U.S. 229 (1976); *see also Perez v. Laredo Junior College*, 706 F.2d 731, 733-34 (5th Cir. 1983) (hiring and assignment practices); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980).

X. CONCLUSION

Based on the above, the Commission finds reasonable cause to believe that, from at least October 1986 to May 1991, Respondent engaged in unlawful employment practices in violation of Title VII by failing to hire women as wait persons because of their sex. The Commission also finds that, since at least October 1986, Respondent has failed and continues to fail to recruit women because of their sex.

The Commission finds no reasonable cause to believe that Respondent has discriminated against women by failing to assign them as dinner servers, but makes no finding as to whether Respondent failed to recruit or hire women for bussing or bartending positions. The Commission finds that Respondent has come into compliance with 29 C.F.R. § 1602 Subpart B by filing EEO-1 Reports for 1989, 1990 and 1991.

For the Commission:

4/17/9[Illegible]
DATE

/s/ Frances M. Hart
FRANCES M. HART
EXECUTIVE OFFICER
EXECUTIVE SECRETARIAT

[LOGO] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

COMMISSIONER'S CHARGE

Pursuant to the authority contained in Sections 706 and 707 of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e *et seq.*, I charge the following employer with unlawful employment practices:

JOE'S STONE CRAB'S INC.
227 BISCAYNE STREET
MIAMI BEACH, FLORIDA 33139

I believe that the employer named above is within the jurisdiction of the Equal Employment Opportunity Commission and has violated and continues to violate Section 703 of Title VII of the Civil Rights Act of 1964, as amended, by discriminating against females because of their sex with respect to recruitment, hiring and assignment. Specifically, the unlawful discriminatory practices include, but are not limited to:

1. Failing to recruit and hire females because of their sex into various service worker positions that involve waiting restaurant tables, bussing restaurant tables, and tending bar;

2. Failing to assign or otherwise limiting the employment opportunities of females in the positions of waiters, bartenders, and bussers in the dining rooms; and

3. Violating Section 709(c) of Title VII of the Civil Rights Acts of 1964, as amended, by

failing to file an Employer Information Report (EEO-1) from at least 1986 to 1990.

The persons aggrieved include all females who have been, continue to be, or might in the future be adversely affected by the unlawful practices complained of herein.

The above allegations are based on a review of documentary evidence and witness testimony regarding the employer's practices. The available information indicates that from at least October 1, 1986, this employer has engaged in a pattern and practice of discrimination against females.

I, Evan J. Kemp, Jr., Commissioner, declare under penalty of perjury that the foregoing is, to the best of my knowledge and belief, true and correct. Executed on this 17th day of June, 1991.

/s/ Evan J. Kemp, Jr.
Commissioner
U.S. Equal Employment
Opportunity Commission